CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI,

FEBRUARY TERM, 1872, AT ST. JOSEPH.

MARY T. POCKMAN *et al.*, Defendants in Error, *v.* ELI MEATT *et al.*, Plaintiffs in Error.

1. *Records — Courts — Correction of — Judgments and entries by — In what manner.* — The correction by a court of an erroneous judgment is not permissible, but the correction of an erroneous entry of a correct judgment is legitimate, even after the case has gone to another court.
2. *Partition — Sale — Fraud — Reversal of proceedings — Estoppel.* — Parties in interest in a partition suit, who receive their land at the partition sale, make no complaint of any unequal distribution, and permit the purchasers to make valuable improvements, and show no fraud or mistake in the proceedings, will be estopped from afterward taking advantage of an irregularity in the order of sale, and having them reversed and a new partition ordered. *A fortiori* would an outsider champertously purchasing, for purposes of speculation, the interest of a party to the original suit who was not disposed to litigate, be forbidden thus to annul the sale.
3. *Partition — Sale — Proceeds, receipt of — Affirmance.* — A partition sale is not like that by a sheriff *in invitum*, but by the voluntary act of the parties, and in general a receipt by them of the proceeds is such an affirmance of the proceedings as waives any right by them to ask for a reversal; although *semble*, that where fraud is shown, the rule is otherwise.

Error to Linn Circuit Court

The proceedings in these cases grow out of a suit for partition of the lands belonging to the estate of John B. Pockman, deceased, in Linn county. The suit was commenced on the 5th day of August, 1866, by filing a petition for partition in the office of the clerk of the Circuit Court of said county. On the 6th day of August, 1867, a final judgment and decree of partition was made. In this final decree, as entered by the clerk, no finding of the interests of the parties in the lands was made. At the April term, 1868, of said Circuit Court, the sheriff made his report of the sale of said lands; and at the next succeeding term of the court, in December, 1869, the defendant Eli Meatt came into court and moved to set aside the sale on the ground of a fraudulent combination among the purchasers and bidders at said sale, and because the judgment of partition was void.

On the hearing of the motion to set aside said sale, among others the following facts were developed: That the purchasers had paid the purchase-money in full for the respective lands bought by them, and had received deeds therefor, and had entered on the lands and made lasting and valuable improvements thereon; that the parties to the original suit had received the greater portion of the money arising from said sale; and that said Meatt, before the time of the filing of said motion to set aside said sale, had sold all his interest in this matter to one James C. Slater.

Two writs of error were then sued out in these matters, under one of which the clerk has certified up all the record in the case up to the time of the motion to set aside the sale; and under the other the clerk has certified up the whole record, including the proceedings had under the motion to set aside the sale. On the 5th day of June, 1871, and after the writs of error in these cases were sued out, the purchasers of the land at said sale filed their motion to correct the record, and to have the real judgment that was rendered by the court entered *nunc pro tunc*, and at the December term, 1871, the said motion was sustained.

G. D. Burgess, for plaintiffs in error.

The plaintiff in error is not estopped from setting the sale aside because of having received a part of the purchase-money, nor because some of the purchasers have made improvements upon the property. They were bound to know that they purchased under a valid judgment, and that the sheriff had authority to sell. (2 Sto. Eq. 1537, § 143; White v. Langdon, 30 Verm. 599; Davidson v. Young, 38 Ill. 152; Odlin v. Gore, 41 N. H. 465; Dixfield v. Newton, 41 Me. 221; Taylor v. Eli, 25 Conn. 250; Hill v. Eply, 31 Penn. St. 331; Taylor v. Zepp, 14 Mo. 482.)

The Circuit Court had no power or authority to correct the judgment in this cause after the term at which the judgment was made final, and more especially while the cause was pending in this court. The clerk of the Circuit Court had already entered up just such a judgment as the court had required him to enter up, and the Circuit Court had lost jurisdiction of the cause. (Smith v. Best, 42 Mo. 185; Stewart *et al.* v. Stringer *et al.*, 41 Mo. 400.)

The case of DeKalb County v. Hixon, 44 Mo. 341, is not in point. In that case the clerk had entirely failed and neglected to enter up the judgment ordered by the court, while in this case the clerk did enter up the judgment, but it is erroneous. Besides, there was no notice given to any of the original parties to the suit that such motion would be made as is required by the fifth rule of the Linn Circuit Court. (Brennan's Estate, 68 Penn.; Am. Law Reg. 1871, p. 535.)

The purchasers of the property at the sale in partition had no right to come into court and ask that the judgment be corrected or entered up *nunc pro tunc*. They purchased with full knowledge of all defects and irregularities in the record and proceedings in the cause in the court below.

A. W. Mullins and *G. W. Easley*, for defendants in error.

I. If the first entry of the judgment was void, the entry of the judgment *nunc pro tunc* shows what the real judgment was, and

cures all defects in the first entry. Under the facts disclosed in the case, the court below had full power to order the proper entry of the judgment to be made, and it was the duty of the court to do so even after the cases were removed to this court. (Gibson v. Chouteau's Heirs, 45 Mo. 171; DeKalb County v. Hixon, 44 Mo. 341; Chichester v. Cande, 2 Cow. 42, note *a*.)

II. Meatt having received a part of his share of the proceeds arising from the sale, cannot question the legality of the sale or judgment. (Stroble v. Smith, 8 Watts, Penn., 280; Penn v. Heisey, 19 Ill. 295; Hamilton v. Hamilton, 4 Penn. St. 198; Wilkins v. Anderson, 11 Penn. St. 399; 2 Sandf. Ch. 341; 21 U. S. Dig. 403, citing 24 Texas, 426.) It would be inequitable to allow the parties to treat this judgment and sale as legal for the purpose of receiving the proceeds arising therefrom, and, after having so received the proceeds, to treat the judgment and sale as invalid. If the judgment is void, as they claim, they lose nothing by it, because they are not divested of any title.

BLISS, Judge, delivered the opinion of the court.

As the order in partition stood when the original writ of error issued, it was erroneous, and it is not clear that the *nunc pro tunc* order was properly made. Courts have a right, even after appeal, to correct obvious errors in the records, not by entering orders and judgments which should have been made, but rather those which were actually made but which the clerk neglected to enter.

The order in this case looks very much like the correction of an erroneous judgment rather than the correction of an erroneous entry of a correct judgment. The former will not be permitted, while the latter is legitimate, even after the case has gone into another court. (DeKalb County v. Hixon, 44 Mo. 341.) But the assignee of defendant Meatt is estopped from seeking to set aside the proceedings. He stands in Meatt's shoes, and even with less title to favor, for he is an outsider who has bought the interest of one disposed to litigate, and is seeking to disturb a matter in which he has no concern. This champertous proceeding certainly

entitled him to no special favor; but we will only consider the case as though the motion was actually that of Meatt, whose name is used.

The judgment before its correction was not void. It was simply erroneous, and the parties might, if they chose, abide by it and receive their distributive share of the money made by the sale of the lands, or they might insist that the proportion to which each one was entitled should be first ascertained by the court according to the statute. But to permit them first to receive their money, and then, without complaining of unequal distribution, or showing any fraud or mistake, and after the purchasers had paid for the land and made valuable improvements, to reverse the proceedings and have a new partition, would outrage every principle of justice and enable parties to judicial proceedings to perpetrate glaring frauds. It is seldom that the doctrine of estoppel is more properly invoked than in the case at bar. The land was sold fairly and honestly and the first payment made; the purchasers went into possession and have made permanent and valuable improvements; this payment was distributed, and Meatt received his share without complaint; the property appreciates in value, and some speculator being advised of the irregularities in the order of sale, advances Meatt the balance of his share of the purchase-money, or nearly so, and takes an assignment of his interest in the estate, and now in Meatt's name moves to set aside the proceedings for irregularity. Meatt himself should not be allowed to do this, least of all his assignee.

In proceedings in partition the sale is by the act of the parties themselves as well as by a judgment, and is not a sale *in invitum* like an ordinary sheriff's sale under execution. (Pentz v. Kuester, 41 Mo. 447.) It does not matter who are the petitioners; the parties are all before the court in a proceeding for the equal benefit of all, and may be all considered as petitioners or plaintiffs. Hence an acquiescence in the judgment, either by petitioners or respondents, by voluntarily receiving the proceeds, is such an affirmance as waives a right to ask for its reversal. It is indeed a voluntary satisfaction, and places it beyond the further control of the court. It is true a satisfaction

of a judgment by execution cannot ordinarily be pleaded in bar to a writ of error, and for the reason that such satisfaction is against the will of the party who sues out the writ. He may still, notwithstanding he has been compelled to pay the judgment, obtain its reversal if erroneous. But if a party obtains a judgment, with which he may be dissatisfied, and then voluntarily enforces it, he may not afterward seek to reverse such judgment to enable him to obtain a better one. (Cassell v. Fagin, 11 Mo. 208.) In Downing v. Still, Adm'r, 43 Mo. 309, the plaintiff was permitted to set aside because of fraud in a judgment and execution in his favor, notwithstanding the property had been sold. The proceedings were had in his name but not by his procurance, and he had done nothing to ratify them.

The judgment will be affirmed. Judge Wagner concurs. Judge Adams absent.

JONATHAN G. FELLOWS, Appellant, *v.* REMUS WISE, Respondent.

1. *Ejectment — Evidence — Common grantor — Notice, actual and constructive.* —In ejectment, proof of a written contract with plaintiff for conveyance of the land from one in possession claiming title, which was subsequently executed by a statutory process (see Wagn. Stat. 99, §§ 38, 43), is sufficient *prima facie* evidence against one claiming under the same grantor, by deed intervening between the contract and its specific execution. The title of the common grantor is acknowledged, and plaintiff need go no further. To prevail against plaintiff's case it must appear that defendant purchased for a valuable consideration without notice of the original contract with plaintiff. And in such case, where the contract was recorded and it appeared that the opposite party was a dealer in real estate, although the record would not be constructive notice, yet this fact might go to the jury in connection with others as tending to show actual notice.

Appeal from Linn Circuit Court.

A. W. Mullins, for appellant.

Burgess & Brownlee, for respondent, cited 48 Penn. 238; 8 Me. 94; 5 Binn. 129.

BLISS, Judge, delivered the opinion of the court.

Both parties claim through Robert Moore, deceased, who died in 1866, having been in possession of the land for several years, claiming under a tax sale. In 1859 said Moore, being so in possession, gave the plaintiff a written obligation for a deed, and in 1869 the latter obtained an order from the Probate Court upon the administrator of Moore for a specific execution of the contract, who accordingly made him a conveyance. This proceeding was under sections 38 and 43, chapter 122, Gen. Stat. 1865 (Wagn. Stat. 99), and seems to be regular. But in December, 1868, the heirs of Moore, then in possession, executed a deed of the premises to one Brownlee, who, in the spring of 1869, gave the defendant a bond for a deed, and he went into possession under it.

The plaintiff asked several instructions, of which the second was, in substance, that if the jury believed that at the date of the plaintiff's bond for the land, the said Robert Moore was in actual possession of the land; that he sold it to the plaintiff and gave him the instrument in writing, read in evidence, for the conveyance of his title and improvements and the possession of the land; that he remained in possession until his death, and that his administrator made the deed to the plaintiff read in evidence, they should render a verdict for the plaintiff, unless the jury should further believe that the heirs of said Moore conveyed the land by the deed offered in evidence to one Brownlee, before the execution of the deed from Moore's administrator to Fellows, and that said purchase of Brownlee was made in good faith for a valuable consideration, without notice of the contract between Moore and Fellows.

This instruction was refused, though for what reason does not appear. The court perhaps assumed that Brownlee, who bought of the heirs, was an innocent purchaser; but this was a question for the jury, which the court had no right to decide. There was evidence tending to prove notice. Brownlee was a real estate dealer, familiar with the titles in the county. Mr. Burgess, who soon became his partner, was fully advised in regard to plaintiff's contract, told Moore's heirs that it would hold the land unless it could be sold to an innocent purchaser, and he sold it for them

for less than one-fourth its value. The contract itself was also put upon record, and though this would not operate as constructive notice, yet the record would be likely to be seen by those in the habit of examining titles; and this, with the other evidence, should have gone to the jury as tending to show notice of the plaintiff's equity.

There is some indication that the court held the conveyance by Moore's administrator worthless, as the jury were instructed to disregard it, and were also told that the plaintiff had shown no title. The plaintiff did not show nor claim to show a perfect paper title. He claimed under a contract from one in possession claiming title which was subsequently executed by a statutory process. That some one else may have a better title does not matter. Defendants did not and could not set up such better title, for they themselves are in under Moore.

It is sufficient, in the first instance, for the plaintiff to show prior possession as owner, either in himself or in his grantor; and if it shall then appear that the defendant holds under the same grantor, it is unnecessary to go further; the title of the common grantor is acknowledged, and so far the rule that the plaintiff must recover upon the strength of his own title is departed from. As against some unknown person, the title of both may be worthless, the common grantor not being the true owner; but as between the parties, we have only to inquire which one acquired the title of such grantor, whatever that might have been. Hence it was sufficient for the plaintiff to show his contract and its specific performance under the statute, together with the actual possession as owner of the obligor in the contract. He would thus establish a *prima facie* right; and unless the defendant could trace his own right or title to the true owner — if such grantor in possession was not the true owner — or could show a better claim to the interest of such grantor, the plaintiff must prevail. (Brown v. Brown, 45 Mo. 412.)

The record does not clearly show the views of the court or the ground of its instructions, yet they seem to ignore these familiar principles of law or to take from the jury the question of notice.

The judgment will be reversed and the cause remanded. Judge Wagner concurs. Judge Adams absent.

WILLIAM CHARLTON, Respondent, *v.* DAVID BROWN, Appellant.

1. *Wills, probate of.— What proof necessary to make will competent as evidence.*— In order that a will may be received in evidence, there should be some proof in writing attached to the will and recorded with it, showing that it had been duly proved. And there should be a certificate of the record of the will and proof. But the statute does not require that the proof should consist of the actual testimony in detail taken at the probate, signed by the witnesses and attested by the clerk; nor that the certificate of the clerk attached should show that it was so signed and attested. The certificate spoken of in section 20, and that in section 26 of the statute touching wills (Wagn. Stat. 1367) cannot be the same. The former is in the nature of a *jurat* to an affidavit showing that the testimony was given and subscribed in open court and before the clerk; while the latter is a certificate to the action of the court.

Appeal from Andrew Circuit Court.

Higgins, and *Strong & Chandler*, for appellant, cited Tyler Eject. 513–14; Vanderpool v. Van Valkenburgh, 6 N. Y. 190; Morris v. Keys, 1 Hill, 540; Caw v. Robertson, 5 N. Y. 125; Hill v. Crockford, 24 N. Y. 128.

H. S. Kelley, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff claims the land in controversy from Thomas Rodgers, the original patentee, through his will devising the same to his son Allen G. Rodgers; and the action of the court in admitting in evidence the record of said will, is claimed to have been erroneous. The present probate judge of the county produced upon the stand and identified the record-book of wills belonging to his office, which contained a record of said will, duly executed and attested, together with the following certificates:

"STATE OF MISSOURI, } *ss.* Andrew County Court.
County of Andrew. }

"November adjourned term, 1846. William G. Ball appears and presents for probate the last will and testament of Thomas Rodgers, deceased, whereupon came Clinton Young and Arthur Roberts, witnesses thereto, who, being duly sworn, depose and say that they saw the said testator subscribe his name to the

same, which he published as his last will and testament; that said testator was of sound mind and disposing memory, and over twenty-one years of age; and that said deponents were called upon by said testator to witness the same, which they did in the presence of said testator; which, being considered by the court, is adjudged sufficient to establish said will, which is established accordingly.

"STATE OF MISSOURI, } ss.
County of Andrew. }

"I, Edwin Toole, clerk of the County Court within and for said county of Andrew, do hereby certify that the within probate is duly copied from the records of said County Court. In witnessing whereof I have hereunto subscribed my name and affixed the seal of said court at my office, this 24th day of February, 1847. EDWIN TOOLE, Clerk.

"By P. S. ROBERTS, Deputy Clerk. [Seal.]

"The foregoing will and probate therein were duly recorded on the first day of March, 1847. EDWIN TOOLE, Clerk.

"By P. S. ROBERTS, Deputy Clerk."

The witness testified that the original will and files were lost, and that he could find no other record in regard to it in his office.

The admission of this record in evidence was objected to because it did not embrace the testimony of the witnesses, signed by them and certified by the clerk; or, if that should be deemed unnecessary, because the certificate of the action of the court did not show that their testimony was reduced to writing, signed and certified.

The statute upon the subject was the same when this will was admitted to probate as now. Section 20 of the present act (Wagn. Stat. 1367) provides that "the testimony adduced in support of any will shall be reduced to writing, signed by the witnesses, and certified by the clerk." The will itself, with the papers attached, have been lost, and we do not know what was done in this regard, but we are not to presume that the clerk neglected his duty. Section 25 (same page) requires simply that wills shall be recorded; and section 26 provides that "every will proved according to the provisions of this chapter, and recorded

and certified by the clerk of the court and attested by his seal of office, may be read as evidence without any further proof thereof." Section 25 makes no express provision for the record of anything but the will; and the question arises, what, under section 26, is necessary to be embraced in the record in order that the will itself may be read in evidence without further proof of its execution, etc.? First, it would seem reasonable that there should be some written evidence attached to the will and recorded with it, showing that it had been duly proved; and, second, that there should be a certificate of the record of such will and proof. What is the evidence that should thus be attached to and recorded with the will? Appellant claims that it should be the testimony itself, signed by the witnesses and attested by the clerk, or at least that the certificate of the clerk attached should show that it was so signed and attested. But the statute does not require either. Judgments do not usually recite the evidence upon which they are rendered, and I do not imagine it to be necessary that the original entry of the proof of the will, upon the minutes of the court, should show in detail that every requisite of the law has been complied with; much less should this be required in the certificate of the clerk to such proof. The certificate spoken of in sections 20 and 26 cannot be the same. The former is in the nature of a *jurat* to an affidavit showing that the testimony was given and subscribed in open court and before the clerk, while the latter is a certificate to the action of the court. In the case under consideration, it is apparently a certified copy of the original entry upon the minute-book of the court. It may be that, or I imagine it would be sufficient if it were simply a certificate of the action of the court, without reciting its minutes; and in neither case is it essential that it specify in detail the manner in which the testimony of the witnesses was given.

Counsel have cited some New York cases, among which are Hill v. Crockford, 24 N. Y. 128, and Morris v. Keys, 1 Hill, 540; but the decisions in those cases were based upon the language of the statute of that State, which required the surrogate to record the will, "together with the proofs," etc.

If the certificate spoken of in section 26 need not embrace the

evidence or show that it was signed by the witnesses, the objection of the appellant is fully met, because the record itself, in its exemplification, when introduced in evidence as provided in section 27, certainly need not show more in this regard.

Defendant's counsel justly criticise the phraseology of part of the first instruction, as seeming to assume what had been proved and directing a verdict. But defendant could not have suffered in consequence; for if the court correctly admitted the will and subsequent conveyances in evidence, the result was inevitable. He made no show of title, while the plaintiff's claim was complete.

Judgment affirmed. Judge Wagner concurs. Judge Adams absent.

JOHN BURNSIDE, Respondent, *v.* JOHN WAYMAN, Appellant.

1. *Deed of trust — Name of trustee may be supplied by a court of equity.* — Where the name of the trustee in a deed of trust was omitted in making out the deed, but the grantor gave the *cestui que trust* verbal authority to fill up the blank with the name of some suitable person, a court of equity has the power to reform the instrument and supply the name of the trustee.
2. *Practice, civil — Counts — Misjoinder.* — A petition containing a count praying for equitable relief, and another separately stated asking for the foreclosure of a mortgage, is not bad for misjoinder.

Appeal from Buchanan Circuit Court.

Wm. H. Sherman, for appellant.

Thomas & Ramey, and *Ben. Loan*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The court overruled a demurrer to the plaintiff's petition, and gave the defendant time to answer, but no answer was filed, and in default thereof judgment was rendered. Afterward defendant filed a motion in arrest of judgment, on account of the insufficiency of the petition, which motion was overruled and the defendant appealed, and the action of the court in overruling the motion in arrest is the only question before this court.

The petition contained four counts. The first count sought equitable relief, and prayed for a remedy on account of a defect in a deed of trust. It seems when the trust deed was made no trustee was selected, but a blank was left in which to insert the name of some suitable person, and the grantor gave the *cestui que trust* authority to appoint a trustee and fill up the blank. The *cestui que trust* neglected to make any appointment and assigned the note and deed to the plaintiff. The object, therefore, of the plaintiff was to have the deed treated as a mortgage, and the property subjected to the payment of the debt. The second count was for the foreclosure of a mortgage which plaintiff held on the same piece of property; and the third and fourth counts were to recover for certain charges which plaintiff had been compelled to pay, which were liens on the property, for the purpose of protecting his title.

It is contended that no recovery could be had or relief granted on the first count because no grantee was named in the deed of trust, and that in consequence thereof the instrument was void and no title was conveyed. But I think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position.

In a recent case in the Supreme Court of the United States (Drury v. Foster, 2 Wall. 24) it was adjudged that a paper executed under seal for the husband's benefit, by husband and wife, acknowledged in separate form by the wife and meant to be a mortgage for her separate lands, but with blank left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband, was no deed as respected the wife, when afterward filled up by the husband and given to a lender of money. But the judgment was placed upon the ground that the wife was disabled from delegating a power, either in writing or by parol, to fill up the blanks and deliver the mortgage, and on the further ground that the acknowledgment of the deed did not come within the requisitions of the statute governing the case. But on the point we are now considering the court say: "We agree, if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to

an agent, with an implied and express authority to fill up the blank and perfect the conveyance, that its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient. But there can be no doubt about the power of a court of equity to reform and give vitality to a deed thus defectively executed, and that power will be freely exercised in furtherance of justice."

It is further urged that there is a misjoinder because the other counts are in the nature of proceedings at law, and could not properly be joined with a count in equity. An examination of the record shows that each cause of action was separately stated in the petition and an appropriate judgment asked in each case. The statute permits the joining of separate causes of action, whether legal or equitable, or both, in the same petition, where they arise out of the same transaction, or transactions connected with the same subject-matter. But where different causes are thus joined they must affect all the parties to the action and be separately stated, with the relief sought in each cause of action, in such manner that they may be intelligibly distinguished. (Wagn. Stat. 1012, § 2.) The reason for the distinction and separation of the causes is that the proceeding in law and equity is different. In the one case the party is entitled to a jury; in the other the trial is before the court.

In the present case there is nothing to show that the defendant was denied any right to which he was properly entitled. The judgment is in all respects regular, and no objections were made or exceptions taken during the course of the trial. There was no misjoinder, nor any such defect in the petition as would justify us in arresting the judgment by a reversal. The objections are all technical; there is no pretense that the plaintiff has obtained more than what is honestly due him, or that the defendant has suffered any injury. The record manifestly discloses that the judgment is for the right party, and it must be affirmed. Judge Bliss concurs. Judge Adams absent.

WILLIAM H. SEARS, Defendant in Error, *v.* J. K. WALL AND A. RENEAU, Plaintiffs in Error.

1. *Instructions must be taken as a whole.*—The fact that isolated instructions are partial or misleading will not authorize a reversal where the instructions taken as a whole present the case properly.

Error to Buchanan Circuit Court.

Strong & Chandler, for plaintiffs in error.

Woodson, Vinyard & Young, and *Fred. Van Waters*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding under the statute for the claim and delivery of personal property, wherein the plaintiff asked for the possession of, and claimed title in himself to, two horses. Upon the filing of the necessary bond they were duly delivered to him; and on the trial, under the evidence and instructions, they were adjudged to be his. Plaintiff acquired title to the property under an agreement with the defendants, by which he sold to them the contents of an ice-house supposed to contain 375 tons. Defendant agreed to pay $800 for the same; the horses in controversy to be taken at $435, and the remainder to be paid in cash. The plaintiff agreed that if he failed to deliver all the ice, he would forfeit all claims due him; and that he would drive, feed and keep the horses in good order at his own expense. The horses were placed in the plaintiff's possession, and remained there until they were illusively obtained by the defendants. Whether the contract was carried out and the ice delivered in accordance with its terms, was a question of fact, and the jury found in the affirmative.

If the instructions fairly expounded the law and were not calculated to mislead, then the judgment must be affirmed. The third and fourth instructions given for the plaintiff were not necessary, but they were harmless.

There was no warranty contained in the agreement as to the quality of the ice, and no covenant against loss by shrinkage. The ice was sold as it was packed in the house, and seems to have been of the average quality put up that year.

The first instruction given at the instance of the plaintiff is not erroneous, as supposed, because it tells the jury to find for the plaintiff if they believe from the evidence that the horses were his. For it is connected with and immediately followed up by a further instruction which asserts that if the defendants delivered the horses to the plaintiff in part payment of the $800 mentioned in the contract, then the horses were his, provided he delivered all the ice in the ice-house, with the exception of some which the evidence showed that the defendants had used or authorized to be used. When taken together the declarations are unobjectionable.

But the first instruction which was offered by the defendants and given by the court, places the case in a clear and unexceptionable light. It tells the jury that if they believe from the evidence that the defendants placed the horses in the custody of the plaintiff for the specific purpose of using them to deliver the ice, and that the horses were to become the property of the plaintiff when the ice was sold and delivered, then the plaintiff held the horses as bailee of defendants during the pending of the sale and the delivering of the ice, and the defendants were only divested of their title in the horses on the fulfillment of the contract; and if plaintiff did not fulfill his contract, then he had no right to the horses or the possession thereof. Plainly, under this instruction the jury found that the plaintiff had fully complied with his contract and delivered the ice. The two instructions given by the court at its own instance were equally explicit and favorable to the defendants. The first directed the jury to find for the defendants unless they believed that the plaintiff sold and delivered all the ice, with the exception of what was used by the defendants and by persons acting under their authority; and the second declared that under the terms of the contract read in evidence, the relation of principal and agent was created between plaintiff and defendants, and plaintiff was bound in good faith to use ordinary care and diligence in the handling, sale and delivery of the defendants' ice, and properly account for all money for the sale of the same. It surely cannot be said that these instructions were not sufficiently favorable to the defendants. They covered the entire case and every issue that was raised in the case. Some of the defendants' instructions refused were wholly

irrelevant and objectionable, and the others were unnecessary. The principal questions are simply of fact. The law was not only fairly but favorably declared for the defendants; the case was well tried, and the prosecution in this court is entirely destitute of merit.

Judgment affirmed. Judge Bliss concurs. Judge Adams absent.

JAMES H. MARTIN, Appellant, *v.* FINESSE E. McLEAN, Respondent.

1. *Judgment cannot be impeached collaterally.*—Judgment against a party duly notified and brought within the jurisdiction of the court, is valid until reversed or annulled in a proceeding instituted for that purpose, and cannot be impeached collaterally.
2. *Petition — Count — Recoupment — Dismissal.*—Where two counts of a petition embrace separate and distinct causes of action, dismissal of one of them will carry with it that of a plea of set-off or recoupment, set up as a defense therein, although on the other count judgment goes for plaintiff.

Appeal from Andrew Circuit Court.

Heren & Rea, for appellant.

This was a bill in equity; the set-off and recoupment went to the whole bill, and should have been estimated and allowed.

H. S. Kelley, for respondent.

Each count in a petition stands as an independent cause of action. An original and a cross-bill make but one suit; the cross-bill is considered as a matter of defense to the bill. (3 Atk. 812; 7 Johns. Ch. 250–2; 3 Danl. Ch. 1743; Slason v. Wright, 14 Verm. 208; Sto. Eq. Pl., § 18; 2 Ind. 90.) The cross-bill being dependent upon the original or principal bill, it is a well-settled practice that the dismissal of the bill necessarily dismisses the cross-bill — disposes of the whole case. (Sto. Eq. Pl., § 399; Nordmanser v. Hitchcock, 40 Mo. 178; 2 Ind. 90; 9 Ind. 505.) So, set-off, counter-claim and recoupment are all strictly matters of defense, and depend upon the pleading which they answer; and if that be dismissed for any cause, or be with-

drawn, these affirmative defenses or claims must fail and go out of court with the petition, or that portion of it to which they are set up. (40 Mo. 178; Sto. Eq. Pl., § 399; 2 Ind. 90.)

WAGNER, Judge, delivered the opinion of the court.

The point that Martin was incapable of being made a party to the action when the judgment was rendered against him upon which the land was sold, cannot be considered here. The record shows that he had notice in the manner prescribed by statute, that the court acquired jurisdiction; and the judgment is therefore valid till reversed or annulled in a proceeding instituted for that purpose. No inquiry as to its binding force can be had collaterally. The question raised when the case was here before on demurrer, was whether the action was maintainable, and we held that it was. (McLean v. Martin, 45 Mo. 393.)

Upon a re-trial in the Circuit Court, the plaintiff amended his petition and set forth therein two counts. The first count seeks to recover for money paid at a sheriff's sale and applied in satisfaction of a judgment against the defendant. The second count prays for a recovery on account of improvements made on the land by the plaintiff's grantee while in possession. The defendant in his answer denies his liability on the cause as embraced in the first count of the plaintiff's petition; and as a defense to the second count, he claimed by way of set-off and recoupment for rents and profits of the land upon which it was alleged the improvements were made, and he also claimed damages for timber cut and taken away.

The court, upon hearing the evidence and proofs, gave judgment for the plaintiff upon the cause of action as embodied in the first count, and dismissed the petition as to the second count; also dismissing defendant's claim for set-off and recoupment as applied to that count. The action of the court in giving judgment for the plaintiff on the first count is in accordance with the judgment rendered by this court when the case was here before, and will consequently not be further considered.

The defendant's claim for set-off and recoupment of damages was not pleaded to the first count, but to the second one; and

therefore, when the second count was dismissed it carried the defense with it, as each count and the defense thereto constituted a separate and distinct cause of action and defense. (Nordmanser v. Hitchcock, 40 Mo. 178.)

As the plaintiff did not appeal from the ruling of the court in dismissing part of his petition, the defendant cannot complain, as his rights were in nowise prejudiced. In point of fact, however, we have examined the record, and the evidence induces us to believe that defendant had no injustice done him. The record here presents no error, and the judgment must therefore be affirmed. Judge Bliss concurs. Judge Adams absent.

JACKSON LANGDON, Respondent, *v.* AMOS GREEN, Appellant.

1. *Testimony, weight of — Supreme Court.* — This court will not determine the weight of testimony in civil law cases.
2. *Land and land titles — Fraudulent misrepresentations — Diligence — Confidence — Proof of fraud, etc.* — Fraudulent misrepresentations and concealment by the vendor of land as to the nature, quality, quantity, situation and title thereof, in order to entitle the vendee to relief, must be in reference to some material thing unknown to the vendee either from want of examination or from want of opportunity to be informed. And if the buyer trusts to representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily in his reach, he must suffer the consequences of his own folly and credulity. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard, or that special confidence was reposed in the representations of the vendor, and that the contract was made and entered into upon the strength of that confidence. And in such cases there should be the clearest proof of the fraudulent misrepresentations.

Appeal from Ray Circuit Court.

A. & T. A. Green, for appellant.

"The vendee has the right to act and contract on the faith of any statement of fact made to him by the other party; and it cannot be imputed to want of diligence that he made no inquiry to ascertain the truth of such statement, but he had the right to rely and act upon such statements as true." (Mead, Adm'r, v.

Bunn, 32 N. Y. 275; Whitney v. Allair, 1 N. Y. 309; Smith v. Countyman, 30 N. Y. 655; Bryan v. Hitchcock, 43 Mo. 528; Van Epp v. Harrison, 5 W. Hill, 63; Sanford v. Handley, 23 Wend. 259; Haight v. Hayt, 19 N. Y. 464, 474; Hubbard v. Briggs, 31 N. Y. 528.)

The only question is, did the party make false representations about material matters, and did the other party rely and act upon them? (Thomas v. Beebe, 25 N. Y. 244; Atwood v. Wright, 29 Ala. 346; Burnett v. Judson, 21 N. Y. 238; Owens v. Recter, 44 Mo. 390.)

Wallace & Mitchell, with *H. M. & A. H. Vories*, for respondent.

The vendee must, in such cases as the one at bar, exercise common prudence and ordinary diligence in the use of the means and appurtenances within his reach, to inform himself of the condition, situation, title, etc., of the property he is about to buy, and he can not rely upon affirmations or representations of the vendor when the means of ascertaining the true condition of the property and state of facts are easily accessible to him by the exercise of ordinary diligence. (Van Epps v. Harrison, 5 Hill, 67–70; Bowring v. Stevens, 2 Carr. & P. 327; Harvey v. Young, Yelverton, 21, and note; Davis v. Meeker, 5 Johns. 354 and cases cited; 2 Kent's Com. 482–4; 1 Sugd. Vend., §§ 3, 4, 6; *id.*, §§ 195, 204; 2 Stark. Ev. 471; 1 Sto. Eq Jur., §§ 200 *a*, 201; Holland v. Anderson *et al.*, 38 Mo. 58–9; Jackson, Ex'r, v. Caldwell, 1 Cow. 642; 1 Sto. Eq., § 191; Dyer v. Hargrave, 10 Ves. 505.)

In House v. Marshall, 18 Mo. 368, the defendant resided in Indiana, and had never been in Missouri; had no opportunity to look at the land, but relied entirely on the representations of the plaintiff, and it is totally unlike the facts of this case. So in Owens v. Rector, 44 Mo. 390, there was nothing, on inspection of the lots, to indicate that the street, when opened, would cut off part of the lots and nine feet of the front of the houses. In this case appellant could see, and was also notified, that the land had been washing away.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the defendant on a promissory note for $1,000. The answer set up that the note was given in part payment of the purchase-money for one-tenth of the Lexington ferryboat and franchises, and about six hundred acres of land and certain lots in the city of Lexington; that the plaintiff made certain representations as to the yearly earnings of the ferryboat and the quality of the land, and that only a certain amount had been washed away by the Missouri river; that, relying on the truth of said representations, and without further investigation, defendant was induced to purchase the one-tenth interest at $10,000; that he paid one-half down, and executed five several notes for $1,000 each for the remainder, the note sued upon being the first one due. The answer further alleges that the representations of the plaintiff were false and fraudulent, and made to deceive defendant, and that the value of the property was not one-half of what it would have been had the plaintiff's representation been true, and asks to recoup the damages sustained in consequence thereof against the note. Plaintiff's replication denied all the allegations of fraud, deceit, and misrepresentation charged in the answer. The trial was before the court and a jury. The verdict and judgment were for plaintiff for the full amount of the note.

On the trial the defendant introduced evidence tending to prove the charges made in his answer, and the plaintiff gave testimony to disprove the same, and tending to sustain the allegations in the replication. There was a great deal of evidence and it was conflicting, and it is not our purpose to either review or comment upon it. As to what the evidence proved, the verdict of the jury is conclusive, and that establishes the plaintiff's case. But it becomes necessary to examine the instructions to see whether the jury were misled or properly directed. This is the only point raised in the record, as no exceptions were taken to any ruling of the court in regard to admitting or excluding evidence. The defendant excepted to the giving of the plaintiff's instructions, and that is the only exception presented in the case. The instruc-

tions which were given for the plaintiff and are complained of are the second, fourth, eighth and tenth in the series.

The second instruction declares that it is not every false affirmation of the seller which will give the buyer an action for, or other right to recoup damages, although he may be deceived by such affirmation. The law aids only the diligent, and the law requires of the purchaser of property the exercise of common prudence, and ordinary diligence and trouble in making search and inquiries to satisfy himself of the correctness and truthfulness of affirmations or representations of the seller of property in regard to the title or condition of the property, before he can claim and obtain relief by way of recoupment of damages on account of such affirmations or representations, unless the jury further believe from the evidence that plaintiff practiced some deceit on defendant to prevent his making the inquiries, search or examination into the correctness or the truthfulness of his affirmations or representations.

The fourth instruction is as follows: "If the jury believe from the evidence that the sale of the property, for which the note sued on was given for part of the price thereof, was closed and consummated by plaintiff with defendant and his co-purchasers by the deed read in evidence, of the date of September 5, 1868, then all prior and cotemporaneous negotiations and representations are by law merged in such deed and the terms thereof, and the jury can look only to said deed for the terms and conditions of such sale, unless the jury further believe from the evidence that the defendant was induced so to close and consummate such sale and purchase by and through false and fraudulent representations of plaintiff concerning the quantity, title or location of such property, which the defendant had not the opportunity or means, by reasonable and ordinary industry and diligence, to learn and ascertain the true facts and conditions concerning."

The eighth instruction is in reference to the rights of riparian owners on the banks of water-courses, and no point is made on it in this court, the counsel for the appellant admitting that the question of false and fraudulent representation is really the only one in the case.

The following is the tenth declaration: "The jury are instructed that the deed read in evidence, of date September 5, 1868, from plaintiff to defendant and others, for the ferry, ferry rights, lands and property, for the purpose of this suit must be taken and considered by the jury as conveying to the defendant and his co-purchasers all the property and franchises therein described, and as a conclusion between the parties as to the extent of ferry franchise, and quantity and quality of property therein purported to be conveyed, except to the extent, if any, that defendant has shown by evidence that such franchise and quantity of such property have fallen short or failed, and the defendant's damages by such falling short or failure by and through the false and fraudulent representations of plaintiff to defendant in such sale, which defendant could not by common prudence ascertain the real facts concerning."

The court then, at the request of the defendant, gave as the law governing the case the following instructions:

"2. The measure of damages, if any are found, is not what the defendant made or lost by the purchase, but it is the difference between the value of the interest sold to the defendant at the time of sale, if the property had been as was represented by the plaintiff, and the value of it as it was in point of fact."

"5. If the jury find from the evidence that the plaintiff falsely and fraudulently represented to the defendant that there was more land than there really was, and that the income from the ferry was greater than it actually was, and that his ferry franchise was more extensive than it actually was, and that the defendant, relying on these representations, was induced to and did make the purchase, but on the faith of these representations; and if the jury further find from the evidence that the note sued upon was given in part payment for the land, boat and franchise so purchased, and the jury should further find from the evidence that there was not the quantity of land represented, and that the income from the ferry was not as large as represented by the plaintiff, and that the extent of ferry franchise was not as represented, then the jury should find for the defendant the difference between the value of the property as represented at that time, if it had been as repre-

sented, and its value in the condition it really was; and if such difference is as great or greater than the note sued upon, they should find for the defendant; and if not as great as the note sued upon, then they should find for the plaintiff only to the extent of the remainder, after deducting such damages."

There was another instruction given, numbered six, which referred to the boundary of the land on the river, and which was the converse of number eight, given for the plaintiff, and which it will not be necessary to consider.

The instructions given for the defendant are as favorable as he could ask, but they are modified by those given at the instance of the plaintiff, and require that, notwithstanding plaintiff's representations, defendant should have exercised common prudence and ordinary diligence.

As to what is said in the first instruction excepted to, concerning affirmations not giving the vendee a right of action, we are unable to see any objection. In making bargains each party is apt to say things which neither regards as of much consequence; and if the buyer trusts to representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, he must suffer the consequences of his own folly and credulity. The vendee must go further and show that some deceit was practiced for the purpose of putting him off his guard, or that special confidence was reposed in the representations of the vendor, and that the contract was made and entered into upon the strength of that confidence.

Fraudulent misrepresentations and concealment by a vendor of land, as to the nature, quality, quantity, situation and title thereof, affecting the whole subject-matter of the contract, will entitle the vendor to relief; but such misrepresentation by the vendor must be in reference to some material thing unknown to the vendee, either from not having examined, or from want of opportunity to be informed, or from special confidence being reposed in the vendor. And in such cases there should be the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract

was founded upon them. (Holland v. Anderson, 38 Mo. 556; Bryan v. Hitchcock, 43 Mo. 527.) In business transactions parties must not neglect the use of their own judgment and discretion.

In House v. Marshall, 18 Mo. 368, the defendant lived in Indiana, and being desirous of removing to Missouri, met with the plaintiff in Kentucky, and after some negotiation contracted to purchase from him a farm which he had recently lived on in Audrain county, Missouri. The defendant had no opportunity to look at the land, but in purchasing he relied solely and entirely on the representations of the plaintiff. When the defendant came to this State and moved on the place, it was found that the plaintiff had made false representations in regard to the same. In an action for part of the purchase-money it was held that the defendant might recoup the damages sustained by him by reason of the false and fraudulent representations of the plaintiff as to the quality and advantages of the land. But in that case it will be perceived that the defendant was in another State, had never seen the land, and had no opportunity of examining it. He trusted entirely to the representations of the plaintiff, and had nothing else to refer to. Had he been on the land and looked at it for himself, a mere affirmation or representation by the plaintiff would hardly have availed him.

The case of McFarland v. Carver, 34 Mo. 195, is in point and is decisive of the question now presented. There McFarland sold Carver a quantity of land for $7,000. Carver paid $5,000 in cash and gave his two notes of $1,000 each for the balance. Suit was brought upon these notes, and for defense and by way of counter-claim, Carver set up in his answer that plaintiff, well knowing that about 125 acres of said land had prior to said sale been overflowed by the waters of the Mississippi river, falsely and fraudulently represented to the defendant that the said 125 acres had never been overflowed or inundated; and the defendant, being ignorant that said land had been overflowed, and relying on the truth of the false and fraudulent representations, accepted the purchase of said land, and by means of the premises he has been damaged $3,500, which he asks to be set off.

There was also a further allegation that the plaintiff knew said lands had overflowed, and were liable to overflow, and that he fraudulently concealed from the defendant that fact, and that the defendant was ignorant that said land had overflowed and was subject to overflow. The replication of the defendant denied the charge of false and fraudulent representation and concealment. On the trial before a jury, the court, at the request of the plaintiff, instructed the jury that if they believed from the evidence that the defect set up as the basis of the defendant's counter-claim was patent, that it was such as might have been discovered by ordinary diligence on the part of the defendant (the purchaser), then the plaintiff was not bound to point out such patent defect, and the jury should find for the plaintiff.

The court, of its own motion, instructed the jury that if they believed from the evidence in the cause that plaintiff, at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant, to throw him off his guard, and to prevent him from making as careful examination of the land as a man of ordinary prudence would otherwise have made, and that defendant was thereby misled, thrown off his guard, and prevented from examining said land, and in consequence thereof was and remained ignorant of the fact that said land was subject to overflow up to the time when he bought said land, then and in that case the jury should find for the defendant, and assess damages according to the measure, etc.

The jury found for the plaintiff for the whole amount claimed, and on error to this court it was decided that the instructions were legally correct, and the judgment was affirmed.

The instructions in that case, and in the one we are now considering, are substantially the same. That the defendant had ample opportunity to inform himself of the situation of the whole property and to become thoroughly conversant therewith, is attested by the fact that for months he had had the whole of it in his hands as agent for the plaintiff, trying to effect a sale thereof. He was on the spot where he could examine the records and see

the property every day. Not being able to effect a sale as agent, he combined with others and purchased it.

Under all the circumstances we think the court properly declared the law, and, upon both authority and principle, the judgment should be affirmed. Judge Bliss concurs. Judge Adams absent.

MESHACH J. COUCH, Respondent, *v.* EPHRAIM FISHER, Appellant.

1. *Judgment — Costs — Appeal.* — A judgment for costs will not support an appeal.

Appeal from Andrew Circuit Court.

Heren & Rea, for appellant.

Higgins, Strong & Chandler, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The parties had mutual claims against each other, and had each instituted a suit against the other in the Andrew County Circuit Court. To adjust all the matters of difference and contention between them, they agreed to submit the same to arbitrators whose award should be final, and provision was made for having it entered as a judgment of court. The submission was made in writing in accordance with the statute, the whole proceedings were regular, and the award was duly made, subscribed and attested.

The controversy grew out of a money indebtedness on one side, and the renting of a farm and stocking it with sheep on the other, which sheep were to be taken care of by the tenant, and a quantity of wool and a certain number of the sheep were to be divided and returned to the landlord. The arbitrators found the amount of money due on one side, and the quantity of wool and number of sheep on the other, and so published in the award. The wool was delivered and the sheep tendered as directed in the award, but the money was not paid. The defendant, to show that the money was due, then gave notice that he would move to have the award confirmed and judgment entered thereon; and during

the term while the motion was pending the plaintiff appeared and excepted to what he termed the report of the referees, because certain orders were not recited in it, and because the award of the referees could not be made a judgment of the court. The exceptions were sustained and the matter was remitted back to the referees with certain instructions. Defendant excepted, and then, at his own request, a judgment was rendered against him for costs.

It is evident that the court entirely misapprehended the nature and character of the proceeding. There was nothing in it resembling a reference, but it was an arbitration throughout, designated and treated as such. The submission was in writing, the arbitrators were sworn, the parties gave bond to abide by the terms of the award, they were duly notified to appear and did appear, and all the evidence in the case was heard. The plaintiff never made any objections to the award, nor did he move to set the same aside as provided for by the statute, or give any notice to that effect.

But as the record now appears, we cannot rectify the error of the court. There is no final judgment in the case. A judgment for costs will not support an appeal, and the motion for the entry of a judgment on the award is still pending in the court. For this reason, then, the appeal must be dismissed. Judge Bliss concurs. Judge Adams absent.

AMOS F. OWENS, Petitioner, *v.* ANDREW COUNTY COURT, Respondent.

1. *Certiorari should be instituted in Circuit Court.*—Unless for special reasons full justice cannot be done by commencing proceedings in *certiorari* in the Circuit Court, this practice will always be required.
2. *Collector — Accounts — Investigation of by County Court — Certiorari — Construction of statute.*—Where a County Court ascertained a balance to be due from the county collector to the county, ordered its payment, and, on his failure to respond, rendered judgment by default against him at the next term and ordered execution to issue thereon (see Gen. Stat. 1865, p. 228, §§ 19–26), *held:*

   1st, that the action of the court was judicial and subject to review on *certiorari.*

2d, that the above provisions were not repealed by implication by the act of 1863–4 (Gen. Stat. 1865, p. 130, § 128), providing for a different method of rendering judgment. The former statute is still in force. (Saline County Subscription case, 45 Mo. 52, commented on.)

3. *Collector's accounts — What mode of proceeding — Ten per cent. penalty — Examined by County Courts.* — The statutes (Gen. Stat. 1865, p. 228, §§ 19–26) were never intended to clothe County Courts with the general power of overhauling all past accounts of collectors. If a settlement regularly made and approved is to be impeached after the term of court has lapsed, and especially after the collector has gone out of office, it cannot be reached by a proceeding under the statute, but the end must be accomplished by an ordinary action; and in a proper case the courts will correct the error of the agents of the county in approving and recording an improper settlement, by giving judgment against the collector for any amount found to be still due the county, notwithstanding such approval. But in such adjustment the ten per cent. penalty to be added by the collector under the statute (Gen. Stat. 1865, p. 114, § 24) should not be charged against him.

Petition for Certiorari.

H. S. Kelley, for petitioner.

The court had no jurisdiction. The statute under which the proceedings were had, so far as it relates to collectors, was superseded and repealed by the act of 1864 (Sess. Acts 1863–4, p. 61). Every affirmative statute repeals by implication a preceding affirmative statute so far as the same is contrary thereto. (Dwar. Stat. 573; Spence v. State, 5 Ind. 41; *id.* 500; 2 Ind. 440; 6 Ind. 146; 13 How. 429; Smith v. State, 14 Mo. 147; 26 N. Y. 169.) The act of 1863–4 professes to provide a complete system for the collection of the whole revenue, State and county, and it in fact contains a system perfect and complete in all its parts, providing a summary proceeding and a speedy remedy in the Circuit Court against a defaulting or delinquent collector, and, according to the principles of the law, repeals by implication even the statute under which the proceedings were had in this case in the County Court. If we were left in this instance to rely upon a repeal by implication alone, there might be some plausibility in contending for a construction of these statutes *in pari materia*, but the act of 1863–4 expressly repeals all laws of a general nature that are contrary to or inconsistent with it. This court has undoubtedly, in such cases as this, regarded the authority of

the County Court as superseded and repealed by the statute referred to. In the Saline County Subscription case, 45 Mo., on p. 55, the court says: "This court, in County of St. Louis v. Sparks, 11 Mo. 201, seems to treat the action of the County Court against a defaulting collector as judicial, it having been based upon the provisions of article II of an act concerning county treasurers, in the revision of 1835 (p. 151)—a very different statute from the one now in force, and one that made it the duty of the County Court to render judgment against the defaulter."

After the collector had made his regular settlement at the expiration of his term of office, if, by mistake or otherwise, any money belonging to the county remained in his hands, proceedings could not be had against him summarily and without notice to him in the County Court; and an order entered up demanding of him a sum of money which had not been claimed when the settlement was made, would be invalid. In such case the proper course would be to proceed in the Circuit Court by motion, as provided in section 128 of the revenue law, or by action on his official bond, or to open up the settlement; and in either case he would be entitled to notice and might contest the validity of the demand. The collector was entitled to ten per cent. as his fees and costs for his extra trouble in collecting the delinquent taxes.

Higgins, Strong & Chandler, for respondent.

This proceeding in the County Court was not such a judicial proceeding as will authorize its action to be reviewed on a *certiorari*. (Saline County Subscription case, 45 Mo. 52.)

But if the court should determine that this case is properly here, and should decide to look into the merits of the settlement of the County Court with the defendant, the respondent contends that, upon the facts shown in the record before it, the settlement was correct and the judgment is right.

Even admitting that section 6, p. 96, Sess. Acts 1863–4, repealed the sections now numbered 19 to 23, p. 228, Gen. Stat. 1865, yet by their incorporation into the General Statutes they were re-enacted. There is no repeal by implication. The two statutes provide different methods of procedure and different pen-

alties, and against different persons. There is in them not only no conflict, but there is hardly a shadow of similarity in their objects.

This court, in 46 Mo. 386, decides that this proceeding was authorized under the law.

Bliss, Judge, delivered the opinion of the court.

Contrary to the usual practice, we allowed this writ without requiring the relator to commence in the Circuit Court. Unless for special reasons full justice cannot be done by the latter course, it will always be required.

The relator was sheriff and collector for Andrew county from 1864 to December 31, 1868. During this period he made his settlements with the County Court regularly and paid over all balances found due into the county treasury. In January, 1869, a newly-constituted County Court, whose judges appear to have held different views from their predecessors upon the principal matters hereinafter to be considered, appointed a committee consisting of one of the judges and its clerk, to examine the accounts of the treasurer and the collector, and the committee reported that the collector had properly accounted for the amounts charged him upon the assessment rolls, but that he had collected of the taxes of 1866 and 1867 the sum of $14,123.77 upon the delinquent lists; that in collecting this sum he either collected or should have collected a ten per cent. penalty amounting to $1,412.37, but that he failed to account for this latter sum and should be charged therewith. The court then directed their clerk to demand this sum of the relator, and the clerk reported that he refused to pay it. Whereupon, at the May term following, an order was entered upon the record reciting the facts and directing the said Owens to pay the sum of $1,412.37 into the county treasury, or, in default, that he should be charged with ten per cent. penalty thereon, and a copy of the order was served upon him. On the fourth day of the August term following, the court entered up judgment by default against him for said sum and penalty, amounting to $1,553.82, to bear thirty per cent. interest; but subsequently, during the said term, the said Owens appeared and moved to set

aside the judgment and for leave to resist the claim, for reasons named; but his motion was overruled and he appealed. The appeal was dismissed in the Circuit Court, and the judgment of dismissal was affirmed in this court. (Andrew County v. Owens, 46 Mo. 386.)

The relator now seeks to review the proceedings of the County Court by *certiorari*, and is met with the objection that the writ will not lie because the proceedings to be reviewed were not judicial. (See Saline County Subscription case, 45 Mo. 52.)

It is held in Marion County v. Phillips, 45 Mo. 75, that the approval and entry upon the records of the County Court of a settlement by the court with the county collector was not a judgment, and that the settlement could be opened and corrected if a mistake had occurred. To that we still adhere, and the defendants in the case at bar acted upon the doctrine of that case when they undertook to open settlements previously recorded and charged the relator with items that should, as they claim, have been included in the settlement. But this proceeding varies radically from the ordinary settlement required by the statute. While the latter is but the presentment of an account by one public agent and its examination by other public agents appointed for the purpose, and the entry of such accounts on the books of the county — a proceeding involving no judgment or action analogous to a judgment — the action of the court now under review is as clearly judicial as any proceeding of a court of record. The court commences with an inquiry into settlements already had, and charges that the collector has not rendered true accounts. It ascertained the balance to be still due the county, and, upon his failing to appear upon the first day of the next term, rendered judgment against him and ordered execution. A prosecutor is the only thing wanting to make it like an ordinary suit; but the law authorizes the County Court to represent the county, and also to act as a court and render judgment in its favor. The rendition of judgment and order of execution being judicial, the action of the court in ascertaining the alleged liability of the relator becomes a judicial inquiry, and their whole proceedings in the premises come up for review under the writ.

The relator asks that the proceedings under review be set aside, first, because the court had no jurisdiction of the case, and for two reasons: 1st, the statute under which the court acted had been repealed; and, 2d, the relator, under the statute, had passed out of the jurisdiction of the court.

The provisions of the statute upon which the action complained of was based have been in force ever since the revision of 1835, and are embraced in sections 19 and 26, chapter 38, Gen. Stat. 1865 (Wagn. Stat. 412–13). It is claimed that they are repealed by implication by the revision act of 1863–4, providing for a different mode of rendering a judgment against defaulting collectors. The revision of 1865 preserved parts of both acts and repealed all that were not embraced in such revision. The two acts — to-wit: the one "of the assessment and collection of the revenue," and the one "of the county treasuries" (Gen. Stat. 1865, p. 225) — in general, made provisions upon different subjects and were not intended to conflict with each other; still there may have been some provisions in each upon the same subject and some cumulative remedies. It is unnecessary to examine them in detail, or consider specifically all the grounds so ingeniously urged by counsel to sustain his view. It is enough to say that, in our own view, both provisions — to-wit: the one under which this proceeding was had (Gen. Stat. 1865, p. 228), and the one in the revision act, first provided in the act of 1863–4 (Gen. Stat. 1865, p. 130, § 128) — could stand without destroying each other; and it is unnecessary to consider the doctrine of repeals by implication as applied to them. (See State v. Draper, 47 Mo. 29.) In the matter of the Saline County Subscription, 45 Mo. 55, I inadvertently intimated that the provision authorizing County Courts to render judgment in cases like the present was no longer in force; and I am glad of an opportunity to say that that intimation was unnecessary and erroneous, and furnishes an illustration of the liability to mistake when judges go outside of the immediate subject under investigation.

Relator objects, secondly, to the court's jurisdiction because he had gone beyond its control by means of this summary proceeding. The record shows that he had made his settlements regu-

larly, that they had been approved and entered upon the records, and that there had been no concealment; but that, when such settlements were made, the county judges were of opinion that the ten per cent. in controversy belonged to the relator, and settled with him accordingly; and that, after the expiration of his term of office, and when new judges had come into power who entertained a different view, this proceeding was commenced.

It is a principle of universal recognition that all statutory provisions authorizing proceedings of a summary character, and contrary to the course of the common law, are to be strictly construed; and they will not be held to deprive one of a regular trial by due course of legal proceedings if any other construction can be given them. An examination of the statute under consideration plainly shows that, so far as collectors are concerned, its object is to compel them to render and settle their accounts as required by section 19. If the collector "shall neglect or refuse to render true accounts or settle with the County Court at each stated term thereof, then the court shall adjust the account of such delinquent according to the best information they can obtain, and ascertain the balance due the county; and if he shall refuse to pay over the balance as ascertained, or appear and show cause for setting aside the settlement, then judgment shall be rendered against him for such balance, with ten per cent. penalty, and the whole to draw interest at the rate of thirty per cent." (§§ 22–3.)

When is this adjustment of accounts and ascertainment of the balance to be made? Must it be at the time the accounting is due, and when the collector refuses to account, or renders untrue accounts? or may the court wait a year or more, and then adopt the summary proceeding? And, further, is their power confined to present collectors — to those over whom they have present jurisdiction — or may they by this proceeding overhaul the accounts of all the collectors who have gone before them? In a word, is their power in this regard confined to the sphere of their immediate duty — *i. e.*, to settling quarterly with the collector, or for the current fiscal year — or is it general in its character?

We are of the opinion that the statute never intended to clothe them with this general power; but if they desire to overhaul past

transactions, as they may well do in case of fraud or mistake, they must proceed by ordinary action, as was done in Marion County v. Phillips. If a settlement regularly made and approved is to be impeached after the term of court has lapsed, and especially after the collector has gone out of office, it must be done by regular judgment; and in a proper case the courts will correct the errors of the agents of the county in approving and recording an improper settlement, by giving judgment against the collector for any amount found to be still due the county, notwithstanding such approval. I do not mean to be understood as saying that at his annual final settlement the collector may not be required to account for all the items improperly omitted in the previous quarterly settlement, and may not be proceeded against for neglecting to do so, for it is his obvious duty thus to account, and the matter has not passed beyond the jurisdiction of the court; but only to hold that in cases like the one under consideration the court has lost its power to proceed under the statute.

In Price v. Johnston County, 15 Mo. 433, the collector had made a fraudulent settlement which was entered upon record. A few days after, and during the same term, the County Court discovered the fraud and vacated the order of settlement, and proceeded under the statute to ascertain the amount due and render judgment. Their action was sustained, upon the familiar ground that the term was not ended, and during its continuance the matter was open, the court had control of its records, and might vacate any order made during the term, and, upon notice, resume the consideration of the matter.

But, in addition to the want of jurisdiction over him, the relator claims, secondly, that the ten per cent. with which he is charged belonged to him as "costs and fees;" that in most instances he did not in fact collect this per cent.; and that, inasmuch as it belonged to him, he had a right to remit it.

The statute has been since changed, expressly requiring the collector to account for this penalty; and as the construction as it then stood is no longer of public importance, I will but briefly consider it. The revision act of 1863–4, incorporated with some changes in the revision act of 1865, provided for the first time

that the collector should receive taxes in the several townships of the county; and with reference, perhaps, to that additional duty, it provided in section 24 (Gen. Stat. 1865, p. 114) that, with certain exceptions in favor of soldiers, if the tax-payer shall not pay to the collector when he visits the several townships, or at his office at the county seat, before the first of December, it shall be the duty of the collector to add an additional tax of ten per cent. upon the amount of the taxes of such tax-payer as "costs and fees," etc. No subsequent provision varies or in any manner qualifies the object of adding this ten per cent. Is there any room for misconstruction? The addition is made expressly as "costs and fees." Whose "costs and fees" are thus provided for? If it be said that the costs of advertising and the cost of making a copy of the delinquent list placed by the clerk in his hands are part of such costs, then this amount should in each case have been ascertained and the collector have been required to pay them; but until the subsequent legislation disposing of this ten per cent., the County Court had no right to charge it to the collector in gross, if at all.

All the proceedings of the County Court in the premises will be reversed. Judge Wagner concurs. Judge Adams absent.

THOMAS W. FAYLES, Respondent, *v.* NATIONAL INSURANCE COMPANY OF HANNIBAL, MO., Appellant.

1. *Insurance companies — Draft — Agency.* — Where the by-laws of an insurance company gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and it appears that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, which drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose, and the company would be bound for the payment of such drafts.

Appeal from Clinton Circuit Court

Geo. H. Shields, for appellant, cited First National Bank of Kansas City v. Hogan, 47 Mo. 474.

Hall & Oliver, for respondent.

I. The evidence offered by plaintiff and objected to by defendant was properly admitted. The action of defendant, in recognizing the validity of the acts of its agent to bind it, is the very best evidence of the agent's authority and of its extent. (6 Wall. 785; 5 Mo. 555; 7 Mo. 318; 2 Stark. Ev. 33.)

II. A recognition by the principal, of the agency in the particular instances, or in similar instances, is evidence of the authority of the agent. (7 Mo. 318; 2 Stark. Ev.)

WAGNER, Judge, delivered the opinion of the court.

The only point saved in the record and presented for our determination is the ruling of the court on the admissibility of the plaintiff's evidence. The action was founded on a bill of exchange purporting to be drawn in the name of the defendant by its general agent, in favor of one Otterman, in payment of a loss which he had sustained by fire on a building which was insured by defendant. The bill was assigned and transferred to the plaintiff.

The answer denied the authority of the agent to draw the bill and make it binding on the company. For the purpose of showing authority, plaintiff gave evidence proving that the general agent had drawn similar bills in like cases, and that the said bills were paid by the company. This evidence was objected to, but the objection was overruled, and it was admitted by the court.

Defendant introduced in evidence the by-laws of the company, the fifth section of which provides that the general agent shall have power to appoint or remove local agents, give them general instructions and directions, render them such assistance as may be necessary to secure business, and also have the general supervision of the agency departments. Power is moreover given him, under the direction of the executive committee, to compromise and settle claims arising from loss and damage.

The trial was before a court without a jury, and judgment was for the plaintiff. If the evidence was admissible, the verdict can not be disturbed.

In the case of the First National Bank of Kansas City v. Hogan, 47 Mo. 472, the proposition was laid down that a draft signed by an officer of an insurance company alone is not binding on the company where there is no evidence of any usage or law giving him authority to bind the company. There it was shown that the secretary signed the draft and acted for the company in the capacity of secretary. But the signing was the only thing from which authority was attempted to be deduced. It was not shown that in a single instance, except that one, he ever undertook as secretary to make a draft as the company's agent. As no direct power was asserted, the signing in one single case would not amount to evidence warranting the conclusion that such authority was devolved on him. If an officer of a corporation openly exercises a power which presupposes a delegated authority for the purpose, and the corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officer will be deemed rightful and the delegated authority will be presumed. Therefore, when the by-laws gave the general agent, under the direction of the executive committee, authority to compromise and settle claims, and when it was seen that he was in the habit of adjusting and settling claims for loss and damage, and that he drew drafts on the company for the same, and that these drafts were honored and paid off, the community and those who dealt with him had a right to presume that authority had been delegated to him for that purpose.

The general principles governing such cases was adjudged by this court in Stothard v. Aull, 7 Mo. 318, where an agent purchased certain articles for his principal and gave a note in the principal's name therefor. He had also given two other notes in the principal's name, which had been discharged. No special authority had been given him to execute the notes. Upon these facts it was held that an authority to purchase articles on credit would imply a power to acknowledge an indebtedness in the name of the person for whom they were bought; that a recognition by the principal of the agency in this particular instance, or in similar instances, was evidence of the authority of the agent; as where one signed policies in the name of another, who, when a

loss occurred, paid the same, that would be evidence of a general authority to sign policies.

I think the evidence was clearly admissible, and the judgment must therefore be affirmed. Judge Bliss concurs. Judge Adams absent.

CHARLES J. NESBITT, Respondent, *v.* SOLOMON HELSER, Appellant.

1. *Agency — Sale of land — Commission — Contract — Different terms.* — A sale of land made by an agent on different terms from those directed by his employer will not bind the latter, although more advantageous than those called for by their contract. But a ratification by the principal of an agreement to sell the land on different terms is equivalent to a prior authority, and the principal will be bound for the amount of commissions agreed upon. And he cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance.

Appeal from Buchanan Circuit Court.

Woodson, Vinyard & Young, for appellant.

The agency created by the contract sued on was a special as contradistinguished from a general agency, and its directions must have been strictly pursued in order to hold the principal liable under the contract. And it makes no difference that the attempted departure from those instructions by the agent was for the interest and benefit of the principal. Every man has a right to decide for himself how his own business shall be conducted. (Tate v. Evans, 7 Mo. 419; Sto. Eq., §§ 126–7 *et seq.*; Mechanics' Bank v. Schaumberg *et al.*, 38 Mo. 28; Pars. Cont. 59.)

A. P. Hereford, for respondent.

A broker or agent who undertakes to sell property for another for commission, if he finds a purchaser willing to buy at the price, has earned his commission and can recover if sale is never completed, provided the failure to complete the same was in consequence of a defect of title and without fault of the broker. (Doty v. Miller, 5 Am. Law Reg. 120.)

WAGNER, Judge, delivered the opinion of the court.

The defendant owned a piece of land in Buchanan county and employed the plaintiff to sell the same, agreeing to give him all that he would obtain over the sum of $1,800; the sale to be made on a credit of one, two and three years, payments in equal annual installments, with six per cent. interest. Plaintiff sold the land, but on different and better terms; that is, the purchaser agreed to pay $2,000 for it, $1,000 in cash and the balance in two equal payments at six and twelve months, with ten per cent. interest. It is alleged that these terms were transmitted to the defendant, and that he approved and ratified the same, and that he was requested to make out and deliver a conveyance of the premises to the purchaser.

When the records were examined an encumbrance was found on the land, and the buyer refused to part with his money and execute the contract till the same was removed. The defendant never executed a deed or took any steps to remove the encumbrance, and the plaintiff has now brought this action to recover $200, the amount which he was to receive for making the sale.

The judge of the Circuit Court having been of counsel by agreement of the parties, the whole case was submitted to Jeff. Chandler, an attorney at law, who heard the evidence, reported the same, and, as a conclusion of law, on the facts determined that the plaintiff was entitled to the amount claimed. Judgment was therefore given for him.

The sale was not made in strict conformity to the original contract, and although it was more advantageous, still that would not bind the principal; for the agent had no authority to vary the terms of the contract, and every man has a right to decide for himself how his business shall be conducted. But the verdict is conclusive that the principal ratified the sale and approved of the agent's conduct, and that was equivalent to a prior authority. It is also a finding that the agent completed his part of the contract, and that the principal neglected to comply with his. It is an established principle that a broker employed to make a sale under an agreement for a commission is entitled to pay when he makes

the sale according to instructions and in good faith; and the principal cannot relieve himself from liability by a refusal to consummate the sale, or by a voluntary act of his own disabling him from performance. (Bailey v. Chapman, 41 Mo. 536; see also Woods v. Stephens, 46 Mo. 555.)

In all things connected with the sale it appears that the plaintiff fulfilled his part of the contract. His performance was complete when he found a purchaser ready and willing to buy and able to complete the agreement. And these facts are all found by the verdict, else the case could not have been decided in favor of the plaintiff under the declarations of law as given. When the contract was reported to the defendant it was his duty to execute the proper conveyance, have the encumbrance canceled, and do everything that was necessary to perfect and carry out the agreement. If he failed to do so, the plaintiff, who had given his time and labor and strictly complied with his part of the contract, should not be made to suffer thereby.

We have not discovered any objections to the instructions either as given or refused. Those given fairly declared the law upon the whole case, and those refused were certainly erroneous. The statute of frauds that is relied upon has nothing to do with the case.

Judgment affirmed. Judge Bliss concurs. Judge Adams absent.

WILLIAM H. WATERS, Appellant, *v.* VIRGINIA B. WATERS, Respondent.

1. *Divorce — Alimony — Counsel fees — Dismissal of suit.* — Under a proper construction of the act of 1868, touching alimony (Wagn. Stat. 535, § 12), in a suit for divorce by the husband against the wife, the latter is entitled to the allowance of a reasonable sum for defending the suit; and this sum should be large enough to cover counsel fees. But they should not be entered up as specific costs; she must make her own terms and pay the amount from the general fund. The sum may be increased if necessary as the suit progresses, and the allowance may be enforced by attachment, or the court may make its payment a condition to the further prosecution of the suit. And the dismissal of the suit by plaintiff while the application for alimony is under consideration by the court, will not defeat the claim, although it may diminish its amount.

Appeal from Buchanan Circuit Court.

Strong & Hedenburg, for appellant.

I. The jurisdiction of our courts in matrimonial cases is limited by statute (Doyle v. Doyle, 26 Mo. 545), and neither our statutes nor former court practice authorize taxation of counsel fees either as costs or alimony.

II. No case can be found holding that after dismissal of suit a court can arbitrarily set aside a judgment of dismissal or nonsuit taken by plaintiff and allow counsel fees as costs. Attorneys at law in the courts of Missouri are allowed no fees which are taxed as costs. They look to contracts made with their clients for remuneration for their services. (See Frissell v. Haile, 18 Mo. 18.)

Woodson, Vinyard & Young, for respondent, cited 2 Bish. Marr. 4th ed., §§ 392–3, 396, 398, 400, 402, 405, 407, 415, 416, 418, 420, 424–5, and authorities cited.

Bliss, Judge, delivered the opinion of the court.

Pending a proceeding for divorce, defendant applied for an allowance of $80 as counsel fees for her defense. Before the application was passed upon, the plaintiff dismissed his petition, but the court proceeded to hear and decide the question, and allowed her counsel the sum of $40, which was taxed in the costs against the plaintiff.

By an enactment in 1868, our statute provides that the court may decree alimony pending the suit for divorce in all cases where the same would be just, whether the wife be plaintiff or defendant, and enforce such order in the manner provided by law in other cases. (Wagn. Stat. 535, § 12.) This amendment to the divorce act was doubtless made to meet a defect developed in Martin v. Martin, 33 Mo. 614, where it was held that under the statute as it then stood, alimony could be allowed to the wife only when she is a party plaintiff. In the opinion of the court Judge Dryden treats the right of the wife to alimony *pendente*

lite as an acknowledged common-law right, and one that would be transferred to our courts but for inconsistent legislation upon the subject. In this remark he seems to differ from the views of Judge Scott in Doyle v. Doyle, 26 Mo. 549.

The term *alimony* in its limited sense means an allowance made to the wife out of the husband's estate for her maintenance, either during a matrimonial suit or at its termination, when she has proved herself entitled to a separate maintenance. (Burrill.) Is the term used in this restricted sense in our statute, or does it also mean the sustenance of the wife in respect to the prosecution or defense of the suit between them? "This sustenance," says Bishop (§ 387, note), "is in fact a sort of alimony; the one—alimony proper—being for defraying the ordinary expenses of the wife in the matter of living; the other being for the same purpose in the matter of the suit." The husband, who has the control of the money out of which, were the parties dwelling together, the wife would be entitled to draw her support, while the wife is without means which she can herself command, should not only be made to aliment the wife as to her food and the like, while the suit is going on, but aliment her also as regards the suit; otherwise she would be denied justice. If the term were used in its more restricted sense it would ordinarily be in the power of the husband to shut the mouth of the wife altogether and drive her out of court, unless supplied by charity with the means of prosecution or defense. All the property belonging to them jointly is in his possession, even though she brought it to him by marriage: she can make no binding contract; those who trust her on her husband's credit do it at their peril (Harshaw v. Merriman, 18 Mo. 106; 25 Mo. 36), and she would be defenseless indeed if the court had no power to relieve her before the termination of her suit. In this view our best courts, whether subjected to any special statute upon the subject or not, have held the husband under obligation to furnish, pending the controversy, out of his estate, in which the wife as such has an interest, not only food and clothing, but the means to protect her rights. Thus, the chancellor, in Daiger v. Daiger, 2 Md. Ch. 337, says: "It is believed that no case can be found in which the wife, living sepa-

rate from her husband, and without an income competent for her support and the maintenance of the suit, has been denied temporary alimony and an allowance to enable her to defend herself or prosecute her suit against her husband."

If we were to adopt the doctrine of Doyle v. Doyle, *supra*, and hold that there can be no allowance *pendente lite* except as provided by statute, then I would give to the term *alimony*, as contained in the statute before quoted, a signification sufficiently extensive to embrace an allowance to maintain the suit; or, if we say with the court in Martin v. Martin, that the common-law right to an allowance in such case is transferred to our courts unless modified by statute, I would hold with the English and most of the American courts, that the allowance should be made.

There is more doubt in regard to the time and manner of the allowance under consideration.

It was correct to tax the costs against the husband, but under our practice there is no warrant for taxing counsel fees in a bill of costs except in partition. Costs are regulated by statute, and in some of the States docket fees or other special fees, which go to the attorneys, are taxable as costs against the losing party. Nothing of this kind is known to our practice. In partition, when (unless there is a contest about title) there are no antagonist parties, but the rights of all are equally guarded, the statute specially provides for an allowance of counsel fees, and their apportionment *pro rata* with other costs among the parties, but any other taxation of such fees in cost bills is irregular. In adopting the common law we by no means adopt the English mode of taxing costs, and hence the exceptional sense of the word in matrimonial cases in the ecclesiastical courts is unknown to our jurisprudence. The allowance, then, under consideration should have been made to defendant in her own name of a reasonable sum to meet the expenses of the suit, leaving her to make her own terms with her own counsel, and the sum may be increased if necessary as the suit progresses, and the allowance may be enforced by attachment or execution; or, when the husband is plaintiff, the court may make its payment a condition to the further prosecution of the suit.

This, it may be said, was not an order pending the suit, for the reason that while the court had the matter under consideration the plaintiff dismissed his suit. I cannot imagine that he could defeat the application in this way, although the fact that the prosecution was to end should affect the amount to be allowed. If the friends of the wife gave her such credit as to enable her to properly appear to the suit, trusting to her ability to obtain an allowance to reimburse them after she had appeared and applied for the proper sum, the application is not only made pending the suit, but it would be a fraud upon her rights to permit the husband to defeat it by then dismissing the proceeding.

Notwithstanding the irregularity in the manner of making the allowance, the plaintiff is not injured by it. The amount is not shown to be excessive, nor is it misappropriated. To reverse the judgment in order to allow the court to change the form of the allowance, is not called for by any consideration of injustice in the judgment as it now stands, and it will be affirmed. Judge Wagner concurs. Judge Adams absent.

JAMES M. REDDICK, Plaintiff in Error, *v.* WILLIAM GRESSMAN, Defendant in Error.

1. *Mortgagee, purchase by at his own sale, effect of.*—A mortgagee with power of sale is a trustee as well as a creditor, and cannot at his own sale become a purchaser, directly or indirectly, so as to cut off the equity of redemption. But such sale is good as to everybody and for all purposes, excepting only that the mortgagor has the right to pay the debt and redeem the land.
2. *Mortgage — Condition broken — Ejectment.*—The mortgagee, after condition broken, may maintain ejectment for the mortgaged land.
3. *Mortgage — Debt payable in installments — Non-payment of single note — Power to sell in case of.*—Where a debt in a mortgage is payable in installments, the condition is broken by non-payment of any one of them, and the mortgagee may thereupon enter or bring ejectment. And it is no defense to such a suit that all the installments are not due. The authorization contained in a mortgage, to sell only in event that "the said notes should not be well and truly paid," should be construed to mean in case they should not be paid as they respectively become due. And the mortgagee is not by such condition compelled to wait till the last note is dishonored before applying his remedy.

Error to Andrew Circuit Court.

H. S. Kelley, for plaintiff in error.

Upon condition broken, the mortgagee may maintain ejectment for the possession of the mortgaged premises. (Tyler Eject. 169; Walcop *et al.* v. McKinney's Heirs, 10 Mo. 229; Sutton v. Mason, 38 Mo. 120; 2 Washb. Real Prop. 226.) When a mortgage is given to secure the payment when due of several promissory notes falling due at different times, it may be foreclosed upon default in payment of the note first due. (Hunt *et al.* v. Harding, 11 Ind. 245; The State Bank v. Tweedy, 8 Blackf. 447; Andrew v. Jones, 3 Blackf. 440; Smith *et al.* v. Shuler *et al.*, 12 Serg. & R. 240; 9 Mass. 258; 7 Mo. 448.)

Strong & Chandler, and *Sherman*, for defendant in error.

I. A mortgagee taking a conveyance with a power of sale is a trustee (Sugd. Vend. 890), and cannot without, and often can not with, the mortgagor's full knowledge and consent, become the purchaser of the property of the mortgagor so held by him. (Davoue v. Fanning, 2 Johns. Ch. 252; Michoud v. Girod, 4 How. 503; Gardner v. Ogden, 22 N. Y. 327; Thornton v. Irwin, 43 Mo. 153.) And if the mortgagee cannot, under a power of sale vested in him by the mortgage, acquire title as against the mortgagor, then at such sale the pretended foreclosure is a nullity as to the mortgagor. Hence the fee still remains in the mortgagor, and ejectment affirming title in the mortgagee cannot be maintained. (Van Slyke v. Shelden, 9 Barb. 278.)

II. The power of sale under the deed could be executed only in the event that "the sum of money specified in said notes and all the interest thereon" which may be due according to the tenor and effect of said notes, or some part thereof, remained unpaid after all of said sum became due and payable. By the very terms of said mortgage, the defendant in error (the mortgagor) could only avoid said mortgage and render it null by paying the sum of said notes and interest. The mortgagor was under no obligation to pay, nor was the mortgagee under any obligation to receive, the sum of said notes and interest thereon, until the said sum was

all due and payable; and said sum was not so due and payable until all the notes matured. And no title passes under a power of sale contained in a mortgage unless the conditions thereof are strictly construed. (4 Allen, Mass., 516; Roarty v. Mitchell, 7 Gray, 243; 14 Mo. 345; 36 Mo. 523; Richards v. Holmes, 18 How. 143.) In cases holding that a sale under a power given in a mortgage for an installment of a debt secured thereby, is valid and binding though the whole debt is not then due, there will almost invariably be found a clause or condition in the mortgage expressly authorizing a sale in case the debt, or any installment thereof, or the interest thereon, remains unpaid after such installment or such interest becomes due and payable, in order to pay off and satisfy such payable installment or interest. In a few cases also it will appear that such sales are expressly authorized by the statutes of the States where such decisions are rendered.

WAGNER, Judge, delivered the opinion of the court.

Substantially the case is this: Plaintiff sold to defendant a certain tract of land and executed a conveyance therefor; the purchase-money was due in installments, and a mortgage was made on the same land to secure the payment thereof. The mortgage contained a power of sale authorizing the creditor, or the sheriff at his request, to sell the premises to satisfy the debt.

The main point in this case rests for its determination upon the construction to be given to the condition in the mortgage, and it is as follows: "If the said Gressman, his executor or administrator, shall pay the sum of money specified in said notes and all the interest that may be due thereon, according to the tenor and effect of said notes, the conveyance shall be void; but if the said notes should not be well and truly paid when the same become due and payable according to the tenor and effect thereof, then this deed shall remain in full force, and the said Reddick or his legal representatives, or, at the request of the legal holder of said notes, the sheriff may proceed to sell the property," etc.

The first installments were not paid when they became due, and the plaintiff, still holding the notes, requested the sheriff to sell the property, which he did, and at the sale the plaintiff purchased

the land and received a deed for the same, and then brought this action in ejectment to recover possession. Upon the trial the court excluded the sheriff's deed upon the ground that he possessed no authority to sell; and in consequence of certain other rulings made, the plaintiff took a nonsuit with leave to move to set it aside, and after an unavailing motion to set the nonsuit aside, this writ of error was prosecuted.

To sustain the judgment of the court below, it is insisted that, as the plaintiff was a mortgagee with power to sell in himself, he was incompetent to buy and take as a purchaser, although the sale was made by the sheriff; and that no forfeiture accrued till the last notes became due and payment was refused. The plaintiff, had he exercised the power of sale given, would certainly have acted in the capacity of a trustee for the creditor; and admitting that the relation was not changed by the employment of the sheriff to make the sale, does it follow that the sale was wholly void and that the purchaser took no title? The doctrine is that a mortgagee with a power of sale is a trustee as well as a creditor, and that at his own sale he cannot become the purchaser either directly or indirectly, so as to cut off the equity of redemption. But such a sale is not entirely and absolutely void. It is good as to everybody and for all purposes, excepting only that the mortgagor still has the right to pay the debt and redeem the land. Such sales are never regarded as nullities, and with the exception above stated they are entirely good. (Allen v. Ransom, 44 Mo. 263; Thornton v. Irwin, 43 Mo. 153.)

That ejectment may be maintained by the mortgagee after condition broken, has long been the established law in this State. (Walcop v. McKinney, 10 Mo. 229; Sutton v. Mason, 38 Mo. 121.) And the law seems equally well settled that where a debt in a mortgage is payable in installments, the condition is broken by non-payment of the first installment, and the party may thereupon resort to his action of ejectment. Mr. Hilliard, in his treatise on the law of mortgages, says: "Under an ordinary mortgage of land for an aggregate debt payable in installments, the mortgagee, upon default in any payment, may enter or bring ejectment and retain possession of the whole, subject to an account

for the profits; because, the condition being indivisible, a failure to pay any part of the debt is in law a forfeiture." (2 Hill. Mortg., 2d ed., 164.) And again, "It was early held in Massachusetts that to an action upon a mortgage securing a note payable by installments, it is no defense that all the installments are not due. The court said that there was nothing in the objection, and that it had been repeatedly overruled." (*Id.* 166, citing Eastabrook v. Moulton, 9 Mass. 528; see also 2 Washb. Real Prop., 3d ed., 226; Smith v. Shuler, 12 Serg. & R. 240; Buford v. Smith, 7 Mo. 489.)

But an attempt is made to evade the principles above announced on account of the phraseology used in the mortgage, which gives the power to sell only in the event that "the said notes should not be well and truly paid." And it is thence sought to draw the inference that no forfeiture could take place until all the notes become due and payable. But this construction is, I think, erroneous, and perverts the language employed. The mortgage, to secure the payment of the notes when they become due, must secure the payment of each note when it becomes due; that is, the payment of the notes when they respectively become due. Any other construction would be, that securing payment of notes falling due at different periods is securing payment of the last note when it becomes due, and all the rest after they become due. The fair and natural meaning undoubtedly is that the notes shall be paid as they become due, and such was the construction placed upon a like provision by the Indiana court in a case entirely parallel with this. (Hunt v. Harding, 11 Ind. 245.)

The result is, the judgment must be reversed and the cause remanded. Judge Bliss concurs. Judge Adams absent.

JAMES PACE, Respondent, *v.* WILLIAM B. PIERCE, Appellant.

1. *Deed of trust — Chattel — Sale — Trover.* — A trustee in a chattel deed of trust has a right to the possession of the property even after sale for the purpose of delivering it to the purchaser. And in case possession is withheld, the trustee may sue in replevin, or, so far as defendant is concerned, in damages for conversion of the property.

Appeal from Linn Court of Common Pleas.

A. W. Mullins, for appellant.

I. The trustee received at the sale a sufficient amount to pay off the debt. He advertised and sold the property and executed a written conveyance thereof to the purchaser, strictly in accordance with the terms of the deed of trust. That sale and conveyance passed to the purchaser whatever title was held by the plaintiff as trustee to said property. No actual delivery of the property by the trustee to the purchaser was necessary, nor is that question material in this case. (Hill. Sales, 98, § 12; Ridgway v. Bowman, 7 Cush. 268, 272; Gibson v. Stevens, 8 How. U. S. 384, 400; Stewart v. Spedden, 5 Md. 433, 448; 7 Gill & J., Md., 407, 418.) But even if there had been no deed of writing, yet from the nature and situation of the property, an actual handling from one to another being impossible, no delivery of possession was necessary to transfer the plaintiff's title to the purchaser. (Hill. Sales, 89, § 5.) By the extinguishment of the debt secured by the deed of trust the powers of the trustee were at an end. (Charter v. Stevens, 3 Denio, 33; 1 Hill. Mortg. 480.)

II. The trustee had no interest whatever in the subject-matter of the action. (Wagn. Stat. 999, § 2.) The case of Lacy, Trustee, v. Gibony, 36 Mo. 320, relied on by counsel for plaintiff, is not an authority in point in this case. In that case the purchaser did not pay his bid, nor did the trustee execute to him a deed or other writing to convey the property, nor was the debt paid off or the deed of trust satisfied.

Burgess & Mansur, for respondent.

Personal property could not be conveyed by deed unless accompanied by a delivery; besides, Pace being trustee, was the proper person to prosecute the suit. (Lacy v. Gibony, 36 Mo. 320.)

Bliss, Judge, delivered the opinion of the court.

Stephenson & Prince purchased of the administratrix of G. H. Schricklin a certain steam mill as personal property, and executed to the plaintiff a trust deed to secure a part of the purchase-

money, for which two $1,000 notes were given. These notes maturing, the trustee advertised and sold the property to one C. C. Stephenson for $2,442, a part of which was paid, and notes with security were given for the balance. But the defendants had in the meantime obtained possession and refused to give it up; wherefore the plaintiff brought suit, alleging his right of possession and claiming damages for the conversion of the property. He recovered a judgment for $2,875, and defendants appealed.

The question presented is whether the plaintiff has any such interest in the property as to entitle him to bring this suit. It is decided in Lacy v. Gibony, 36 Mo. 320, that the trustee in a deed of trust of personal property to secure a debt, has, after the maturity of the debt, a right to the possession of the property, and that this right continues after he has sold the same, for the purpose of enabling him to deliver possession to the purchaser. The decision is based upon the fact that in the sale of personal property delivery is a material part of the transaction; that it is the duty of the trustee to give possession, and the sale is not complete without it. If, as is settled by that case, he can bring suit for possession, is he the proper party to sue for damages for the conversion of the property? Defendants claim that inasmuch as the purchaser has paid part of the purchase-money and given his notes for the balance, he alone had a right to sue. If the sale was so complete that the purchaser was bound by it, and could not look to the plaintiff for anything further, this position might be correct; but if delivery is necessary to complete the sale, then the purchaser may repudiate it without such delivery, and recover back his money or look to the vendor for damages. An interest then remains in the vendor; and if, as we have seen, he may bring his action for the possession, why not for damages? Ordinarily, when replevin will lie, trover will also lie. A wrongful conversion will authorize either action, and in case the property cannot be reached, the latter is the only remedy. Had this been property that could be spirited away or materially injured, the trustee might be left without the power of protecting the beneficiary, unless the remedy pursued were left open to him. Hence

the owner in trust of personal property, entitled to possession, should be entitled to either remedy.

The beneficiary or the purchaser at the trustee's sale may complain of the course pursued, but the defendants certainly cannot. They are wrong-doers, and their refusal to give up the property to the rightful owner has justly subjected them to damages for their wrongful act. The judgment vests the property in them, and they have no interest in any controversy or adjustment between the trustee and others.

Judgment affirmed. Judge Wagner concurs. Judge Adams absent.

THOMAS D. PRICE AND HENRY A. SHERRILL, Plaintiffs in Error, *v.* W. S. EVANS AND T. D. EVANS, Defendants in Error.

1. *Practice, civil — New trial — Verdict — Jury, conduct of.* — The refusal of a court to grant a new trial, where a motion is based on alleged absence of any testimony to warrant a verdict, is not error unless the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption, or gross ignorance on the part of the jury.
2. *Practice, civil — Evidence — Supreme Court.* — This court will not review the facts when the evidence is conflicting.

Error to Linn Court of Common Pleas.

Henry Lander and *G. W. Easley*, for plaintiffs in error.

G. D. Burgess and *C. H. Mansur*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The petition contained two counts, one for $700 paid by plaintiffs as sureties for defendants, and one for a balance of account at their bank of $346. The answer averred payment of the note and a deposit to the plaintiffs' credit of $1,200, for which defendants, after deducting the $346, asked judgment. The jury found for defendants on the first count, and gave the plaintiffs a verdict of $380 upon the second. The instructions were correct, and we are asked to grant a new trial because there

was no evidence to sustain the verdict upon the first count. There is reason to believe that the verdict was wrong, and I think the trial court would have been justified in giving a new trial. Notwithstanding trial courts may thus act when they see the jury has been misled, yet if they refuse to do so, it is not error unless the preponderance of evidence against the verdict is so strong as to raise a presumption of prejudice, corruption, or gross ignorance on the part of the jury. Such has been our uniform holding, and any other would be impossible.

One of the grounds for the motion was newly-discovered evidence, but the affidavit shows that it was known before the trial but not deemed necessary. Defendants failed in saddling upon the plaintiffs the $1.200 deposit which had once been accounted for, but succeeded, and perhaps unjustly, with the $700. But owing to our well-settled and absolutely necessary rule of not reviewing facts when there is conflicting evidence, we cannot relieve them.

Judgment affirmed. Judge Wagner concurs. Judge Adams absent.

WILLIAM J. MILLER, Respondent, *v.* CLARK NORTHUP, ANDERSON SCROGGINS AND O. A. TURNER, Appellants.

1. *Forcible entry and detainer*—Indicia *of actual possession*—*What sufficient.*—In an action of forcible entry and detainer it appeared that plaintiff, in entering upon land, caused it to be surveyed, established the corners, cut hay upon the land and ricked it up, and forbade others to cut hay upon it; *held*, that such acts amounted to open and visible *indicia* of possession, from which the jury might deduce actual possession and find for plaintiff.
2. *Forcible entry and detainer*—*Proof of possession*—*What sufficient.*—In actions under the statute for forcible entry and detainer, proof of title in the plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession. But plaintiff need not be always on the land, provided the occupation by the owner is intended to be permanent.
3. *Forcible entry*—*Possession*—*Wild lands*—There may be possession in fact of unimproved and uncultivated land. An entry upon land, with the intention of clearing and fitting it up for cultivation, is such an entry as that a jury may be authorized to infer actual possession from it.

Appeal from Sullivan Circuit Court.

G. D. Burgess, for appellants.

The evidence shows that the land in controversy was, at the time appellants entered, uninclosed, no person residing on it, nor was any part of it in cultivation, nor was there anything connected with the property which indicated to the public that any person claimed to be in possession of the premises. It was a smooth prairie tract, entirely barren of improvements of any kind or description. There was no actual possession as distinguished from constructive. An actual possession is required. (Brown v. Dean, 9 Mo. 298; Holland v. Reed, 11 Mo. 605; McCartney v. Mullen, 38 Ill. 237; McCartney's Adm'r v. Alderson, 45 Mo. 39.)

Brownlee, Easley & Mullins, for respondent.

Actual occupancy is not necessary to sustain an action, and actual possession may be shown by any act of possession. (Langworthy v. Myers, 4 Iowa, 18; Roberts v. Long, 12 B. Monr. 194; Campbell v. Thomas, 9 B. Monr. 82; Bell v. Longworth, 6 Ind. 273.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer, brought by the plaintiff against the defendant, to recover the possession of a tract of land lying in Linn county. Before the justice of the peace plaintiff had judgment, and on appeal to the Circuit Court the finding was again for him. The record shows that the plaintiff purchased the land, and within a short time thereafter had it surveyed and the corner-stones established; that during that year and the year following he cut hay upon the land, and permitted no person to use it without his consent. After his purchase he had it assessed in his own name and paid taxes on it. The evidence further tended to prove that the plaintiff had a hay-rick on the land when the defendants took possession, and that he had permitted an adjoining proprietor to build a fence on the east line of it for the purpose of planting a hedge.

The only point raised was whether this constituted sufficient possession to entitle the plaintiff to maintain the action for forcible entry and detainer. The court, at the instance of the plaintiff, in substance instructed the jury that if they believed from the evidence that the plaintiff was, at any time within three years next before the commencement of the action, in peaceable possession of the premises, and while so possessed thereof, and before the action was commenced, the defendants, without his consent and against his will, entered into and took possession, then they should find for plaintiff; and that, in order to constitute possession in the plaintiff, it was not necessary that he should stay on the land, or keep agents or servants there; but that any act done by himself on the premises, indicating an intention to hold the possession thereof in himself, was sufficient to give him actual possession.

There was a further instruction declaring that if the fence built on the line of said land was built with the consent of the plaintiff, such building was not a possession adverse to the plaintiff, but might be considered as tending to show possession in him.

The court, at defendants' request, told the jury that before they could find for the plaintiff they must believe from the evidence that, at the time of the alleged entry and detainer of the premises by the defendants, the plaintiff was in the actual possession thereof; and that, if they believed that the person who built the fence was in the actual possession of any part of the premises, then they would not take such possession into consideration in making their verdict. The court, of its own motion, gave an additional instruction, the purport of which was that to enable the plaintiff to maintain his action, his possession must have been actual as distinguished from constructive; that the premises, at the time of the alleged entry and detainer, must have furnished visible tokens of occupancy. Some of the instructions asked for by defendants, and refused, asserted incorrect propositions of law; and the others were useless, as those already given sufficiently covered the case.

In actions under the statute for forcible entry and detainer, proof of title in the plaintiff, with payment of taxes and acts

of ownership merely, is not evidence of peaceable possession. (McCartney *et al.* v. Alderson *et al.*, 45 Mo. 35) But it is not necessary to be always on the land, provided the occupation by the owner is intended to be permanent. Thus, in the case of Bartlett v. Draper, 23 Mo. 407, the plaintiff had peaceably taken possession of his own lots, formerly occupied by defendants, and commenced building a fence around them, but in the autumn had proceeded only so far as to plant the posts. In the spring, before he had completed the fence, the defendants entered against his protest and fenced the lots. In an action against them the court held that "any act done by himself (the plaintiff) on the premises, indicating an intention to hold possession thereof to himself, will be sufficient to give him the actual possession." (See also Hoffstetter v. Blattner, 8 Mo. 276; Lockwood v. Thorp, *id.* 636; Kincaid v. Logue, 7 Mo. 168.)

In the present case the record shows that at the time the defendants entered upon the land and detained the same, the premises were not inclosed and no house was built upon them. But the jury were not thence bound to infer that the plaintiff could not have been in the actual possession. There may be possession in fact of unimproved and uncultivated land. (Wall v. Nelson, 3 Litt. 398; Langworthy v. Meyers *et al.*, 4 Iowa, 18.) An entry upon land, with the intention of clearing and fitting it for cultivation, is such an entry as that the jury may be authorized to infer actual possession from it. (Humphrey v. Jones, 3 Monr. 261.) A different doctrine would place the owners of wild and uncultivated land at the mercy of every intruder and trespasser who might choose to settle upon it.

The acts of the plaintiff here were not confined to acts of mere ownership or the assertion of title. He entered upon the land, caused it to be surveyed, and established the corners. He cut hay upon the land and ricked it up, and forbade others from cutting hay. This, it seems to me, amounts to open and visible *indicia* of possession, from which the jury were authorized to infer or deduce actual possession.

The rulings of the court coincide entirely with our views of the law upon the question of what is sufficient to constitute actual

possession, and there was undoubtedly sufficient evidence to take the case to the jury. The plaintiff remitted a part of the damages assessed by the jury, and after that was done there is nothing left authorizing our interference on account of excessiveness in the verdict.

Judgment affirmed. Judge Bliss concurs. Judge Adams absent.

THE STATE OF MISSOURI *ex rel.* ST. JOSEPH BRIDGE BUILDING COMPANY, Relator, *v.* JOHN SEVERANCE, MAYOR OF THE CITY OF ST. JOSEPH, Respondent.

1. *Railroad bonds — Subscription — St. Joseph Bridge Company* — Mandamus. — By the terms of the original subscription by the city of St. Joseph to the St. Joseph Bridge Company, the city agreed to deliver to the company bonds in separate installments of $50,000, one installment to be delivered upon the expenditure by the company of each successive $100,000 until the completion of the bridge. By a subsequent modifying ordinance fifty per cent. of the total amount subscribed was to be paid when called for by the company. *Held*, that the plain intent of the latter ordinance was that whenever the required amount was used in the building of the bridge, which would entitle the company to an additional installment of the bonds, they should be delivered, although that amount, or some of it, may have been derived from money arising from the city bonds theretofore transferred.

Petition for Mandamus.

W. P. Hall, for relator.

It was because of the failure to secure money independent of the city subscription that the modifying ordinance was passed and the original subscription was changed. The city knew that relator could not get money from sources independent of the city, and hence modified its original subscription so that relator might be relieved from the necessity of raising money outside of the city subscription. In the face of these facts, for the city now to say that it intended that the relator should, under the modified subscription, be required to provide means independent of the city subscription, is to ignore the very purpose for which the modification was made. The true meaning of the city's subscription, as

modified, is this: that the city should issue $250,000 of its bonds on call, and that, whenever relator should expend on its bridge $100,000, no matter from what source derived, the city should issue to relator $50,000 more bonds, and so on until its subscription was exhausted. This is the cotemporaneous construction adopted by all parties whose duty it was to enforce the ordinances of the city.

Jeff. Chandler, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The petitioner applies for a writ of *mandamus* to compel the defendant, who is mayor of the city of St. Joseph, to deliver a certain amount of bonds on account of the subscription made by the said city to aid in the building and construction of the plaintiff's bridge.

There is no dispute about the power of the city to subscribe, and the facts in the case are agreed upon; and the only question is whether, upon a proper construction of the ordinances authorizing the subscription, and by the terms by which it was made, the plaintiff is entitled to the bonds demanded at this time.

The original ordinance empowering the mayor and council to subscribe for stock in the undertaking, provided that if two-thirds of the qualified voters of the city of St. Joseph, at an election to be held for that purpose, should assent to the subscription, then the mayor and council should without delay cause the bonds and coupons to be engraved at the expense of the city and deposited with the city treasurer; and when $100,000 should actually have been expended by the Bridge Company in the construction of the bridge across the Missouri river at St. Joseph, the mayor of the city should certify such fact to the city treasurer, and the treasurer should thereupon deliver to said Bridge Company, or its duly authorized agents, $50,000 of the said bonds of the city; and whenever an additional sum of $100,000 should have been expended, and shown in the manner provided by law, a like sum of $50,000 of the bonds of the city should be delivered to the company, and so in like manner should each additional install-

ment of $50,000 of the bonds of the city be paid, and upon the completion of the bridge the balance of the bonds, if any remained unissued, should be delivered to the company.

At the election held in pursuance of this ordinance 1,555 votes were cast for the subscription, and 25 votes against it. An ordinance was then framed and passed by the city council, authorizing and directing the mayor, in the name of the city, to subscribe for 5,000 shares of the capital stock of the company, amounting to $500,000. By virtue of the power the mayor made the subscription. Afterward an ordinance was adopted making a proposition to modify the terms of the subscription, which provided that the city should pay fifty per cent. of said subscription in the bonds of the city, of the character specified in the prior subscription, upon calls, in such manner and in such proportions as should be determined by the board of directors of the company, in conformity to its charter and the laws of the State, and the balance of the subscription should be paid in the manner provided for in the original subscription. This proposition was also carried at the election held for that purpose by a vote of 1,619 to 65.

In accordance with the authority thus given, an ordinance was passed making the modification, and the mayor acted in conformity therewith. It is agreed that the parties have acted in pursuance of the modified terms, and a large proportion of the bonds have been duly delivered by the mayor to the company; but the last installment called for was refused. This refusal was based on the ground that it did not appear that the sum expended was derived from other sources than the sale of city bonds, as contemplated in the first ordinance. The point then arises for determination, whether the modified subscription required that it should be so raised. Some object was had in view in modifying the first subscription. It was that the great improvement which, as the vote shows, the citizens almost unanimously believed would conduce to their benefit, should not be stopped because the company had not succeeded in obtaining the requisite amount of funds elsewhere. Hence half the amount of the whole subscription was advanced at once as the company needed it, and the balance was to be paid in installments when a certain amount

was laid out and expended upon the construction and building of the bridge. It seems to me that the clear intent was that whenever the required amount was used in the building of the bridge, which would entitle the company to an additional installment of the bonds, they should be delivered, although that amount, or some of it, may have been derived from the money arising from the city bonds. There is nothing in the ordinance directly sustaining any other view. The only requirement is that $100,000 shall be expended before the $50,000 shall be delivered. But no mention is made of the source whence the $100,000 shall come. The requiring of the expenditure was intended as a guaranty of the good faith of the company. This was the cotemporaneous construction placed upon the ordinance by the parties themselves, and on which they have acted, and upon which large and important interests have vested. Although this would not be controlling if the language was clearly the other way, yet in doubtful cases it is entitled to and should receive weight. I think that when the plaintiff made its proof as required, that it had expended the necessary sum, although it did not appear that it was derived from a source other than the sale of the city bonds, then the mayor should have delivered the additional bonds demanded.

A peremptory writ will therefore be ordered. Judge Bliss concurs. Judge Adams absent.

MICHAEL FISCHER, Respondent, *v.* JACOB MAX AND M. K. GOETZ, Appellants.

1. *Practice, civil — Pleading — Allegata and probata — Amendment, order for.*—Where parties are misled by an allegation in the petition, they should follow the statute (Wagn. Stat. 1033, § 1) and obtain an order compelling the amendment of the petition upon terms. If they are surprised, an amendment may entitle them to a continuance at the cost of the adverse party.

Appeal from Buchanan Court of Common Pleas.

F. T. Ledergerber, for appellants.

A. P. Hereford, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought his action against the defendants for damages for non-fulfillment of an alleged contract. The petition states that on or about the first of September, 1869, the plaintiff sold to the defendants a lot of barley, to be delivered in ten days or two weeks, and averred a readiness or willingness to perform his part of the contract, and a refusal by the defendants to receive and pay for the barley on their side. The answer denied that such a contract was made on the first of September or at any other time. There was a trial before a jury and verdict for the plaintiff.

No objections are made to the instructions, and the only question presented is the ruling of the court in admitting testimony. A witness was introduced whose evidence tended to show that the contract was made about the first of October instead of September. This evidence was objected to as being inadmissible under the pleadings, but the objection was overruled and the evidence admitted.

The strict principles of variance between the pleadings and the proof have been to a great extent modified by our practice act. The statute provides that no variance between the allegation in the pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; and that, when it shall be alleged that a party has been so misled, the facts shall be proved to the satisfaction of the court, by affidavit showing in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just. (Wagn. Stat. 1033, § 1.)

It is apparent that the evidence had no tendency to mislead the defendants to their prejudice. They denied that the contract was made at the time stated in the petition or at any other time. They held that there was no contract. If they were misled they should have followed the statutes and obtained an order compelling an amendment of the petition upon terms. If they were surprised, an amendment might have entitled them to a continuance at the

cost of the adverse party. But there is no pretense of surprise, and there was none in fact.

There is certainly no error in this record, and the judgment must be affirmed. Judge Bliss concurs. Judge Adams absent.

SAMUEL J. HAMAKER, ADMINISTRATOR OF D. W. HAMAKER, DECEASED, Appellant, *v.* D. G. SCHROERS *et al.*, Respondents.

1. *Bond — Penalty — Liquidated damages—Question one of intent.*—Whether a sum inserted in an instrument, to be paid in case of breach, is to be regarded as a penalty or liquidated damages, must be determined by the nature of the contract and its provisions. If the whole scope of the writing shows that it is intended as a penalty, it will be so treated, without reference to any particular language the parties may have used.
2. *Bond — Agreements and conditions of — Liquidated damages.* — A. entered into a contract with B., by the terms of which A. agreed to deliver to B. 100 grain and seed drills of a particular pattern, within a specified time. The full contract price of the drills was $1,600, and A. was to be at the whole expense of getting them up. As an indemnity, and to guarantee the faithful performance of the contract, he executed and delivered a bond in the sum of $1,600, conditioned that he would fully comply with the agreement. *Held*, that the amount named in the bond should be treated as a penalty, and not as liquidated damages.

Appeal from Buchanan Court of Common Pleas.

Everett & Reed, for appellant.

I. At the time the contract was made the parties could make no exact computation of the damages resulting from non-performance. Hence they had the right to liquidate their damages. (3 Pars. Cont. 159; 17 Ind. 12.)

II. The contract contained but a single covenant, as is evident from the fact that it would be entirely performed by the delivery to plaintiff of the 100 machines (21 N. Y. 256; 2 Allen, 460), and that one covenant was entirely broken. In such cases the amount specified is recoverable as liquidated damages. (19 Barb. 388; 48 Penn. 450; 6 Blackf. 207; 2 Allen, 460; 31 Mo. 52.)

III. Admitting that the contract contained several covenants, a position contended for by defendant's counsel, still they all

sound in uncertain damages; and in such cases even the sum agreed upon by the parties is to be deemed liquidated damages. (17 Ind. 10; 13 Gray, 42; 16 N. Y. 469; 5 Seld. 551; 18 Barb. 336; 12 Barb. 147; 11 Barb. 127; 10 Barb. 60; 48 Penn. 455; 17 Wend. 447; 22 Wend. 201; 11 Ind. 70; 19 D. Smith, 573; 1 Ind. 149; 11 Ind. 273; 31 Mo. 52.)

IV. It is well established that courts will not interfere with the amount agreed upon by the parties, provided the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature or extent of the injury. And in this case the defendants bound themselves in the very same sum at which the work and materials they were to give plaintiff were valued. (2 Sto. Eq., § 1318.)

J. P. Grubb, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The court properly declared the law in reference to the character of the bond, and held that the damages therein provided for were not in the nature of liquidated or stated damages. Where the parties have agreed that in case one of them shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of damages sustained by such act or omission, courts will not interfere to grant relief, but will deem the parties entitled to fix their own measure of damages, provided that the damages do not assume the character of gross extravagance, or of wanton and unreasonable disproportion to the nature and extent of the injury; and whether a sum inserted in an instrument, to be paid in case of breach, is to be regarded as a penalty or liquidated damages, must be determined by the nature of the contract and its provisions. If the whole scope of the writing shows that it is intended as a penalty, it will be so treated, without reference to any particular language the parties may have used. (Morse v. Rathburn, 42 Mo. 594, where the authorities are cited and examined.)

By the record in this case it appears that the plaintiff's intestate entered into a contract with the defendant in which, for the

sum of $1,600, the defendant agreed to deliver to him 100 grain and seed drills of a particular pattern, within a specified time. As an indemnity to the plaintiff's intestate, and to guarantee the faithful performance of the contract, the defendant on his part, with others as his sureties, executed and delivered a bond in the sum of $1,600, in which they bound themselves that the defendant should fully comply with the agreement. The bond is in the usual and ordinary form of such instruments. The case was submitted to the court on an agreed statement, and the only question was whether the damages were liquidated and agreed upon by the parties, or whether the bond was to be treated as a penalty. There was no proof of actual damages, and the court awarded nominal damages only.

The parties, when they executed this bond, surely did not intend that the whole $1,600 should be paid at all events, upon any breach or failure to comply with the agreement. Suppose the defendant had made and delivered ninety drills and omitted to make and deliver the other ten, it will hardly be believed that in such case he would be liable to pay, on account of his omission, the whole sum designated in the bond. Yet, for aught that appears in the record, such may be the fact. Did he fail to deliver any, the damages could be easily ascertained and computed; but certainly they would not be the whole amount of the value of the drills, the labor and the materials, all of which the defendant was to furnish. By recurring to the agreement, it can never be presumed that the parties had the sum in view as the measure of damages. The full contract price for the drills was $1,600, and the defendant was to be at the whole expense of getting them up. It would be a strange construction to suppose that the plaintiff's damages, on a failure in fulfilling such a bargain, were fixed at the entire sum of the contract price.

The judgment is affirmed. Judge Bliss concurs. Judge Adams absent.

THE STATE OF MISSOURI, Respondent, *v.* JOHN DOUGHER, Appellant.

1. *Indictment — Liquor — Selling without license.* — The selling of liquors without license is not an offense subject to be proceeded against by indictment, unless defendant consents to that mode of prosecution. (State v. Huffschmidt, 47 Mo. 73, affirmed.)

Appeal from Linn Circuit Court.

Geo. W. Easley, for respondent.

BLISS, Judge, delivered the opinion of the court.

The defendant was indicted for selling intoxicating liquors without license, and moved to quash the indictment because it was not an indictable offense. The motion being overruled he appeals. The question was considered in The State v. Huffschmidt, 47 Mo. 73. The defendant has not consented to this mode of the exercise of the court's jurisdiction, and the case is reversed. Judge Wagner concurs. Judge Adams absent.

THE STATE OF MISSOURI, Defendant in Error, *v.* JOHN SNIDER, Plaintiff in Error.

1. *Indictment — Selling liquor without license, etc.* — Indictment will not lie for selling whisky without a license, where defendant does not waive his objections to the mode of prosecution. (State v. Huffschmidt, 47 Mo. 73.)

Error to Linn Circuit Court.

Easley, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The defendant was indicted for selling whisky without a license, and demurred to the indictment. He did not waive his objections to the mode by which he was prosecuted, and the judgment against him is reversed. (State v. Huffschmidt, 47 Mo. 73.) Judge Wagner concurs. Judge Adams absent.

DAVID B. WATERMAN, Appellant, *v.* JOHN A. JOHNSON, JOSEPH E. SMITH AND DAVID E. STOTTS, Respondents.

1. *Equity — Injunction — Allegation of insolvency, etc.*—An injunction is not the proper remedy to prevent the wrongful sale of land, where there is no allegation of insolvency or other matter bringing the case within some exclusive branch of equity jurisdiction.
2. *Specific performance — Partnership — Covenant — Estoppel.*—A. sold out his interest in a partnership with B. to C., on condition that C. should pay the amount of a note from himself to B., and that B. should then surrender to him the note. *Held*, that the note having been paid and C. put in possession in his place, and in all respects treated by B. as partner, the latter could not afterward claim that C. had failed to perform certain acts necessary to consummate the new partnership, and so refuse to deliver the note.

Appeal from Andrew Circuit Court.

As appears from the petition, in December, 1866, plaintiff executed to one William A. J. Smith his note for $2,300, and to secure it executed to Smith his mortgage, with power of sale, conveying the undivided half of certain lands in Andrew county, Missouri. Afterward plaintiff paid on the note $1,500, and Smith assigned it, with the credit thereon, to defendant Johnson. After the assignment, plaintiff and Johnson were the joint owners and operators of a steam saw-mill in Gentry county, Missouri. In 1869, defendant Joseph E. Smith applied to plaintiff to purchase his interest in said steam saw-mill and its business; and plaintiff, at the request of said defendant Johnson, and also of the said defendant Smith, sold his interest in the mill to said Joseph E. Smith, on condition that said Smith should pay the balance due on plaintiff's note to Johnston, and take and return said note to plaintiff and satisfy and release the lien of said deed of mortgage. It was agreed between said Smith, Johnson and plaintiff that Johnson would surrender and assign plaintiff's note to Smith, and that Smith should deliver the same to plaintiff and satisfy the mortgage on plaintiff's land, on delivery of plaintiff's interest to said Joseph E. Smith, and on the further condition that plaintiff would release Johnson from the payment of about $100 due plain-

tiff on the settlement of their partnership affairs. The petition further stated that at the instance and request and by the agency of the said Johnson, plaintiff gave up and surrendered all his interest in said mill and its business to said Joseph E. Smith, and released said Johnson from the payment of the said sum due to plaintiff from him, and Johnson agreed and promised to receive the notes of Joseph E. Smith in lieu of plaintiff's note; that said Johnson and Joseph E. Smith, in pursuance of said agreement, took possession of plaintiff's interest in said mill and its business, and changed the firm-name and style of said firm to Johnson & Smith. Wherefore plaintiff stated that his note was paid and satisfied as before stated; that notwithstanding said agreement and payment of said note, defendant Johnson refused to surrender the same to plaintiff according to his agreement, but had caused defendant Stotts, who was sheriff of Andrew county, Missouri, to advertise plaintiff's real estate for sale under said mortgage, to pay the alleged balance due on said note; that said Stotts, having advertised said real estate for sale, threatened to, and would, sell the same under color of said mortgage; that such sale would be in fraud of plaintiff's rights in the premises, and plaintiff would be remediless if such sale were made; wherefore plaintiff prayed an injunction against the said Stotts and Johnson to prohibit such threatened sale, and for decree for specific performance of said contract against defendants Smith and Johnson.

Strong & Chandler, for appellant.

Heren & Rea, for respondents.

WAGNER, Judge, delivered the opinion of the court.

Had the petition simply asked for an injunction, the decision of the court in dissolving the temporary restraining order and dismissing the proceeding, would undoubtedly have been correct; for an injunction is not the proper remedy to prevent the wrongful sale of land, where there is no allegation of insolvency or other matter bringing the case within some exclusive branch of

equity jurisprudence. But the petition in this case, in addition to the prayer for an injunction, asked for the specific performance of a contract, and the cancellation and surrender of a note and mortgage.

The only witness there was to support the defense set up was the defendant Johnson himself, and his evidence is clearly overborne and outweighed by the array of testimony for the plaintiff. The evidence leaves no doubt on my mind that an agreement was arrived at and a contract made between Waterman and Johnson. Waterman unquestionably thought so, and Johnson admitted it and acted upon it. He not only told the company at Waterman's house that he made the trade, but he went back to the mill and told Smith that such was the fact, and in pursuance of the bargain put Smith in possession of the mill as a partner, and the two jointly carried on the mill in their partnership name, which Johnson caused to be changed from the old firm to the new.

When the mill was thus delivered up and changed hands, through the agency of Johnson in carrying out the agreement with Waterman, it was too late for him afterward to say that Smith had not paid the $100 that he agreed to pay, and therefore the contract was not consummated. Had Johnson relied on that payment as a condition precedent, he should have insisted upon it before he put Smith in possession of the mill as a partner. When he did so, and surrendered up Waterman's property to Smith, and recognized him as a full partner, Waterman had a right to suppose that the money was either paid or that its payment was waived. Nothing was heard from Johnson about Smith's default till a dissatisfaction sprung up between them, and then it was that Johnson suddenly discovered that the agreement was never carried out, and that Waterman was still a part owner of the mill. There is no dispute as regards Smith's readiness and willingness to execute the mortgage that he was to give to secure the payment of the purchase-money to Johnson.

Upon the whole case I think it is very clear that the contract was consummated, and that possession was given under the contract, and that Waterman is entitled to have his note and mortgage delivered up to him. That Smith and Johnson do not get

along well with their business, ought not to injuriously affect Waterman, when he has fully complied with his agreement and parted with his property on the strength thereof.

The judgment will be reversed and the cause remanded. Judge Bliss concurs. Judge Adams absent.

JOHN C. WATERMAN AND JOHN W. LOWELL, Respondents, *v.* HENRY YOUNGER AND THOMAS E. TOOTLE, Appellants.

1. *Contracts — Payments — Application of — Mechanics' lien.* — If one owing another on several distinct demands fails to designate on what particular demand a payment is to be credited, the creditor may place it as a payment on any of the demands at his pleasure. Thus, it would be no defense to suit on mechanics' lien that the contractor had paid money enough to plaintiff to satisfy the debt, when it further appeared that the money had been paid on a general account for materials used in erecting various buildings, and that the plaintiff, in the absence of directions from the contractor, had applied the payments to other buildings than that whereon the lien had attached.

Appeal from Buchanan Circuit Court.

The jury in this case found a verdict for plaintiffs for the amount sued on, and found that plaintiffs were entitled to a lien on defendants' property for the amount.

Woodson, Vinyard & Young, for appellants.

I. Where there has been no special appropriation of the payments made by either party to a running account, they will be applied to the discharge of the items of debt antecedently due, in the order of time in which they stand in the account. (1 Sto. Eq. Jur., § 459 *a;* 2 Pars. Cont. 633; Clayton's case, 1 Meriv. 572, 604, 608; United States v. Kirkpatrick, 9 Wheat. 737; United States v. Wardell, 5 Mason, 82, 87; Speek v. Commonwealth, 3 Watts & S. 328; Berghaus v. Alter, 9 Watts, 394; Thurlow v. Gilmore, 40 Me. 378; Draffin v. City of Boonville, 8 Mo. 395; City of St. Joseph v. Merlatt, 26 Mo. 233.)

II. No material-man can have a lien on a building, or the ground on which it is situate, for materials used therein, unless

he has a contract for furnishing the same, either with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor. (Wagn. Stat. 907, § 1; Hause v. Thompson, 36 Mo. 450; Hause v. Carroll, 37 Mo. 578.)

III. The creditor, in the absence of directions from the debtor, must make the appropriation of the payment at the time it is paid to him; otherwise the law will make the appropriation, and it will be too late for him to attempt to do so afterward. (Clayton's case, *supra;* Stone v. Seymour, 15 Wend. 23.) The most liberal authorities that can be invoked by respondents, all require that a creditor making an application of a payment after it is paid in, must do so within a reasonable time thereafter. As to what is a reasonable time is a question for the jury—a thing wholly ignored in the instruction complained of.

Strong & Hedenburg, for respondents.

The application of payments is at the discretion of the payee, except when paid on a particular account, or where the debtor indicates a particular application. (Middleton v. Riley, 21 Mo. 412.) The citation of authorities on this point is unnecessary.

WAGNER, Judge, delivered the opinion of the court.

We see nothing objectionable in the action of the court in reference to its instructions regarding a contract between Younger and Tootle. The evidence shows that Younger did the work, that Tootle recognized him and paid him at different times; and that was sufficient to warrant the jury in finding a contract between the parties. The real contest in the case relates to the appropriation of payments, and upon that question I do not think that the court erred. Younger undertook to do the carpenters' work on a house for Tootle, and the plaintiffs were lumber merchants, and furnished him materials for the same. Younger failed to pay for all the materials, and the plaintiffs filed their lien against the property to secure the payment of the balance. The lien was filed, notice given, and suit brought within the proper time. It seems that Younger was a general contractor, and was building other houses at the same time that he was at work on Tootle's house,

and that on the ledger plaintiff kept a general account and charged him with all the lumber he bought; but when the lumber was delivered, the quantity got for the respective houses was charged separately on the journal and was also placed on the wagon ticket. Younger made two payments on account of the lumber furnished for Tootle's house, which were duly credited; and before the filing of the lien he paid the plaintiff a sufficient amount to pay off the entire demand, which was credited to his general account. It does not appear from what source this money was derived, nor that any direction was given by the debtor as to how it should be appropriated. Had it been applied to the first items as they stood on the ledger, it would have extinguished the liability for which this lien is prosecuted. It is now insisted that, as Younger gave no specific directions in regard to the appropriation, the creditor had no discretion, but was bound to appropriate it to the first items on the account. But this is not correct. In the first place, the general charge on the ledger was not conclusive proof that the plaintiff intended to look solely to Younger for their debt; and in the next place, the rule is that if the party paying fails to designate or direct the payment to be placed to his credit on a certain or particular demand, and there be several demands against him in favor of the creditor, then, in the absence of any direction how and where to give credit, the creditor may place it as a payment on any of his demands at his option. (Middleton v. Frame, 21 Mo. 412; McCune v. Belt, 45 Mo. 174.)

I think that the court properly instructed the jury in reference to the law governing the appropriation of payments, and the two instructions given by the court of its own motion manifestly placed the case before them correctly.

The record exhibits no error, and the judgment will be affirmed. Judge Bliss concurs. Judge Adams absent.

THE STATE OF MISSOURI, Respondent, *v.* THOMAS ROSS, Appellant.

1. *Practice, criminal — Misdemeanor — Information — Repeal of law — Jurisdiction.* — Under the act touching laws, etc. (Wagn. Stat. 895, § 7), the court continued to have jurisdiction over one charged on information with a misdemeanor, notwithstanding that the act authorizing such proceeding was repealed pending the trial.

Appeal from Ray Circuit Court.

J. W. Shotwell, for appellant.

John G. Woods, for respondent.

BLISS, Judge, delivered the opinion of the court.

The defendant was charged, by information, with disturbing the peace of the family of the complaining witness, and fined $1. Before the case was tried, the act authorizing informations for misdemeanor was repealed, and defendant claims that the court in consequence ceased to have jurisdiction over him. But the general act concerning "laws," etc. (Gen. Stat. 1865, ch. 5, § 7; Wagn. Stat. 895), provides that "no action, plea or prosecution, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provisions had not been repealed," etc., and this provision applies to all acts after the passage of the general statutes.

Defendant also claims that the judgment was not warranted by the evidence. No great disturbance was created by him, but it appears that he and others were out at night together for a common purpose; that they came to the house of the complaining witness, supposing it to be another one; that two of them went to the door, defendant remaining at the gate, and asked for admittance, using no violent or threatening language, but still language insulting to a decent family; that when told to leave they did not do so until the complainant's daughter called for help. We do not think this is such a case of failure of evidence as to warrant our interference, even in a criminal prosecution.

The defendant's companions went to the house by his consent and procurance; they had a joint and common object — the commission of an immoral act, the suggestion of which would be offensive to the complaining witness and his family; in pursuance of that object the offense was committed and the family insulted, and the defendant should be satisfied with the slight punishment he has suffered for his connection with the affair.

Judgment affirmed. Judge Wagner concurs. Judge Adams absent.

ALBE M. SAXTON AND THOMAS D. HASTINGS, Defendants in Error, *v.* KEYES H. ALLEN, Plaintiff in Error.

1. *Practice, civil — Evidence — Motion for new trial — Supreme Court.* — An objection to the admission of testimony, not urged upon the attention of the court, and not incorporated in the motion for new trial, will not be inquired into in the Supreme Court.

Error to Buchanan Circuit Court.

W. S. Everett, for plaintiff in error.

H. K. White, and *Vories & Vories*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs entered into a contract with the defendant by which they sold and delivered to him a certain quantity of cord-wood at $4.75 per cord. Subsequent to the sale and delivery it was ascertained that there was a mistake in the measurement of the wood, and that there was a greater number of cords than what was paid for, and this action was commenced to recover the amount claimed in consequence of this mistake. The trial was had before the court and a jury, and the verdict was for the plaintiffs. With the weight or preponderance of the evidence we have no special concern, but upon an examination it is manifest that it strongly supports the verdict.

An objection is taken that the court erred in ruling out certain evidence offered by the defendant, but this objection was not incorporated in the motion for a new trial or urged upon the

attention of the trial court, and therefore it will not be inquired into here.

At the request of the plaintiffs the court instructed the jury that if they believed from the evidence that in the measurement of the wood sold by plaintiffs to defendant there was a mistake made against plaintiffs of 170 cords, or any other number of cords, and that, after said mistake was discovered, the defendant was requested to correct said mistake and pay for said wood so omitted from the calculation, then the jury should find for plaintiffs the value of said wood so omitted, at the rate of $4.75 per cord, and might add thereto interest at six per cent. per annum from the time the demand was made to correct the mistake. The third instruction asked for on the part of the defendant and given by the court, told the jury that if they believed from the evidence that in the measurement of the wood by plaintiffs to defendant, there was no mistake made against the plaintiffs of 170 cords of wood, or any other number of cords, but believed that the wood so sold and measured amounted to 3,071 cords, and that the same had been paid for by defendant, then they should find for the defendant.

These instructions covered the only issue there was in the case, and presented the law clearly and fairly. The simple question was whether there was a mistake committed in the measurement of the wood, and that was for the jury to determine upon the evidence. The first instruction asked by the defendant was rightfully refused because it was not relevant to the case as made by the pleadings and the evidence. The second instruction, declaring that the measurement by the city inspector was conclusive, was also objectionable, and we cannot see that the court committed error in refusing it. We do not know what the powers of the city inspector are. The ordinances defining his duties and authority were not submitted in evidence, and are not referred to in the record. Whether he had any power to act, and the nature of the evidence to be given to his acts, are matters about which we are not advised.

The judgment must be affirmed. Judge Bliss concurs. Judge Adams absent.

WILLIAM W. WALDEN, Defendant in Error, *v.* WILLLIAM H. DUDLEY, Plaintiff in Error.

1. *Collector — Lands used for agriculture — Assessments irregular and void — Remedy.* — A county collector is not personally liable for levying on land embraced within town limits and regularly assessed for town taxes, although the lands were used exclusively for agricultural purposes. It is his duty to collect all taxes contained in the assessor's list; and he has no discretion in the matter, except where property is expressly exempt from taxation by law, and the assessment is simply void. Where there is any liability he is bound to levy, and cannot be held personally liable because the levy was irregular. It was the duty of the party assessed to object to the assessment, and, if it went against him, to review it by a direct proceeding in the city court of appeals.
2. *Chillicothe — Corporate limits.* — The act of March 4, 1869 (Sess. Acts 1869, p. 96), extending the corporate limits of the city of Chillicothe, Mo., is constitutional.
3. *Costs — Re-taxation of — Supreme Court.* — The Supreme Court will in a proper case re-tax excessive costs charged by the clerk of the lower court.

Error to Livingston Circuit Court.

W. C. Samuel, for plaintiff in error.

I. The act of the General Assembly, approved February 26, 1869, extending the corporate limits of the city, is not in conflict with the constitution. (Cooley Const. Lim. 192–3; St. Louis v. Allen, 13 Mo. 400; St. Louis v. Russell, 9 Mo. 503; Sharp v. Dunavan, 17 B. Monr. 223; Weeks v. Milwaukee, 10 Wis. 242, 262; Langworthy v. Dubuque, 16 Iowa, 271.)

II. The act extending the boundary of the city was not an act granting a new charter or franchise, but was a mere enlargement of and auxiliary to that which it already possessed under its original charter. (2 Allen, 29; 2 Gray, 58.)

III. The city of Chillicothe was a corporation with full power to levy and collect taxes before the adoption of the new constitution; therefore section 5, article VIII, has no application to this case.

Collier, *Broaddus* and *Pollard*, for defendant in error.

The act of February 26, 1869, is unconstitutional, in so far as it includes plaintiff's residence and farm within the corporate limits of Chillicothe: (1) Because the constitution does not

expressly confer the power upon the Legislature to enlarge the corporate limits of towns and cities, so as to embrace vacant or cultivated lands or farms lying near or adjacent thereto, nor is the power included in the grant of legislative power. (22 Mo. 387; 9 B. Monr. 330; 8 Iowa, 82; 4 Hill, 145.) (2) Because the power to pass said act by the Legislature is expressly prohibited in the constitution in this: it provides that "no person shall be deprived of his life, liberty or property, except by the judgment of his peers or by the law of the land;" and it further provides that "no private property ought to be taken or applied to public use without just compensation." (1 Dana, Ky., 481; 5 Dana, Ky., 28; 6 Barb. 507; 4 Harr. 479; 4 Hill, 145; 9 Gill & J. 365; 7 Gill & J. 365; 7 Gill & J. 7.) (3) Because at the time said act was passed extending the limits of the city of Chillicothe, there were less than 5,000 permanent inhabitants in said city, and neither the people thereof, nor the people residing within the new limits embraced by said act, by a direct vote or otherwise, decided in favor of the incorporation of such new limits. (Const. Mo., art. VIII, § 5.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff is the owner of real estate within the extended corporate limits of the town of Chillicothe, which was regularly assessed for town taxes. He claims that the land is used exclusively for agricultural purposes; that it is not laid out in lots and blocks, and is not liable to municipal taxation; and he brings this suit against the collector to recover property seized for the payment of the tax. The plaintiff does not claim any express exemption by statute, but only that the Legislature has no power to include farming land within corporate limits so as to subject it to corporate taxation.

We cannot pass upon the question in this form of action. The collector is an executive officer. In general it is his duty to collect all the taxes contained in the assessor's list. He has no discretion in the matter, and is liable for the non-performance of his duty. The exception is that where property is expressly exempt from taxation by law, then the assessor has no jurisdic-

tion, the assessment is simply void; he has no right to collect it. Accordingly we have uniformly held that the collector is not personally liable where the assessment has been irregular, provided there was any liability; and on the other hand, that he is liable when the property is wholly exempt. (St. Louis B. & S. Ins. Co. v. Lightner, 47 Mo. 393; St. Louis M. Ins. Co. v. Charles, *id.* 462, and other cases not yet reported.)

It may be said that the case does not come within the principle that exonerates the collector from liability, for the reason that the property is exempt under the general provisions of the constitution forbidding the Legislature from taking private property without compensation, etc. It may be that the Legislature may, in a given case, so abuse its power by improperly extending corporate limits — thereby including and subjecting to corporate taxation property that really does not belong to the corporation — that courts would be authorized to interfere and release such property. If they were to do so, it would not be upon the ground that courts could interfere with legislative discretion as to the geographical limits of municipal corporations, but that they might restrain the assessment of taxes upon lands presumptively outside of any corporation boundary, and annexed merely for the purpose of subjecting them to taxation to support such corporation. This *animus* of the legislative body must, it is true, be arrived at from the situation of the property, its uses and its relation to the corporation. Yet the question involves judicial inquiry and the most serious consideration. It is purely a judicial one, and ought not be decided — cannot properly be decided — by tax collectors. Were the property expressly and unconditionally exempt and by plain description, the collector would be bound to know it; but it is asking altogether too much of him to decide that a legislative act within the scope of legislative power is void or valid, according to the secondary object of its enactment. It would be a grave exercise of power even by a judicial body, and the power is altogether beyond that of an executive officer.

It is true that executive officers are bound to know the law, and are bound in some cases to know the limits of legislative authority. Thus, it has been sometimes held that they are responsible for the

forcible collection of taxes from those who by charter are exempt from taxation, notwithstanding a subsequent illegal attempt by the Legislature to violate the charter in that regard. But these cases are not like the present one. The Legislature had parted with its right to assess the specific tax, and the attempted resumption of that right was held to be an act altogether void, the matter for the time being having passed out of its jurisdiction. But in the case at bar the general jurisdiction is admitted. The collector finds the property placed by the Legislature within corporation bounds which it had a right to fix; he also finds the property assessed by competent authority, and what is he to do? Can he say that this legislative act was improper? that it was dictated by a wrong motive? that its object was to compel neighboring farmers to help pay corporation expenses? And coming to this conclusion, can he remit the tax? I think not. Before the property is exempt, several judicial questions must be decided; and it was the plaintiff's duty to object to the assessment, and, if the decision was against him, to review it by a direct proceeding in the city court of appeals. (Lee v. Thomas, *ante*, p. 112.) I do not intend to express any opinion upon the question sought to be raised, but only to say that it cannot come up in a suit against the collector.

The plaintiff makes one claim, however, which, if legitimate, goes to the authority to make any assessment outside of the old city limits; and, by depriving the city authorities of any jurisdiction, would leave the collector without any protection. The corporate limits of the city were extended on March 4, 1869 (Sess. Acts 1869, p. 96), and the extension is claimed to have been made without constitutional authority. This claim goes to the general power of the Legislature to extend the corporate limits of the town; and as to those provisions of the present constitution in common with the old one, the claim has been before made and rejected by this court. (City of St. Louis v. Russell, 9 Mo. 507; City of St. Louis v. Allen, 13 Mo. 400.) Nor can it be sustained by the requirement of section 5, article VIII, of the present constitution; for that, by its terms, applies only to cities thereafter to be incorporated.

The circuit clerk has sent up a record of 124 pages, for which he has taxed the sum of $65.59. Of this fifty-four pages belong to the record of the case, and even that contains many things that should have been omitted. It is made our duty by statute to re-tax against the clerk costs thus improperly made.

The judgment of the Circuit Court will be reversed; and in rendering judgment for costs, the sum of $34 will be taxed against the clerk. Judge Wagner concurs. Judge Adams absent.

VALENTINE HARMAN, Respondent, *v.* WILLIAM M. SHOTWELL AND JOHN W. SHOTWELL, Appellants.

1. *Practice, civil — Instructions by court and counsel.*— When counsel present to the court correct views of the law, in a clear and distinct form, and so as not to mislead the jury, the better practice is for the court to adopt the instructions thus presented. Yet the judge has a right to present his own views in his own language; and often, from the obscurity or multiplicity of instructions presented by counsel, it is his duty to do so.

Appeal from Ray Court of Common Pleas.

Dunn & Garner, and *Bannister & Hughes*, for appellants.

Donaldson & Farris, and *Black & Black*, for respondent.

BLISS, Judge, delivered the opinion of the court.

This suit was brought to recover a balance due on a contract to burn and deliver at the kiln 180,000 merchantable brick at $8 per 1,000, and the defense was that the brick were not burned and delivered according to contract, either in the amount or quality, or at the time stipulated; that defendants had overpaid for the brick actually delivered, and had suffered damages for the breach of the contract, for which they asked judgment. Both parties asked for instructions sustaining their view of the law, but the court ignored them and gave instructions on its own motion. The defendants, against whom judgment was rendered, complained of the refusal to instruct the jury as requested by them; and

inasmuch as the second, third and fourth instructions asked were correct, the court erred in refusing them, unless their substance was embraced in those given on its own motion.

The court held that merchantable brick meant brick suitable for the purposes intended by the contract, and directed the jury to ascertain the number of merchantable brick made and burned by the plaintiff under the contract, deducting what was sold to others, and allow him the contract price, and allow defendants the amount paid, and render a verdict for the balance either way, unless they further found that the whole amount was received by defendants, in which event they were to find for the plaintiff their value, not exceeding the contract price, and allow defendants the amount paid on the same, together with any damages they might have sustained growing out of the transaction on account of the failure of the plaintiff to comply with the contract, and give a verdict for any balance found due either party.

This is the substance of instruction No. 2, and I think it could hardly have embraced what the court intended to say. It seems to suppose two conditions of things in regard to the fulfillment of the contract by the plaintiff: one when the brick were made and burned, but not taken away, and the other when they were actually received by defendants. If made and burned only, the plaintiff was entitled to the contract price, deducting only the amount paid, but allowing no damages; but if they were received by defendants, then their value only, not exceeding the contract price, was to be paid, and the defendants were to be allowed their damages. There is obscurity in the language, but this seems to be its meaning, and I can see no reason for the distinction.

By the contract they were to be made and burned upon the premises of the plaintiff, and defendants were to haul them away. If they were not burned in season for use, or not in the quantity called for, I do not see why defendants should pay for them without deducting damages, or even accept them at all, and still be allowed damages if they hauled them away. The court, perhaps, meant to say that if the plaintiff had made and burned the number of brick contracted for, and, according to the contract, ready to be delivered to defendants, then the defendants are liable for

the contract price, deducting only the amount paid; but if the contract was not fulfilled by him, but still he had made brick which defendants received and appropriated, then they must pay for the number actually accepted whatever they were worth, not exceeding the contract price, and in that case should be allowed to offset the damages suffered from the breach of the contract.

Whatever idea was in the mind of the judge, I do not think the jury could have understood this to be his meaning. Where counsel present to the court correct views of the law, in a clear and distinct form, and so as not to mislead the jury, the better practice is for the court to adopt the instructions thus presented; yet the judge has a right to present his views in his own language, and often, from the obscurity and multiplicity of the instructions submitted by counsel, it is his duty to do so.

The judgment will be reversed and the cause remanded. Judge Wagner concurs. Judge Adams absent.

LUCIEN P. WOOLDRIDGE, Appellant, *v.* SIDNEY QUINN, E. A. HOLCOMB, *et al.*, Respondents.

1. *Replevin bond — Action on — Bond payable to sheriff — Remedy.* — A bond given by defendant in a replevin suit, conditioned for the delivery of the property to the sheriff instead of the plaintiff, does not conform to the statute (Wagn. Stat. 1024, § 4), and hence does not authorize a summary judgment under the statute. (Wagn. Stat. 1028, § 14.)

   In such a case a motion to set aside the judgment or quash the execution, or both, is the proper course, and the party should not be driven to his writ of error.

Appeal from Chariton Circuit Court.

Chas. A. Winslow, for appellant.

I. There can be no doubt but that this bond was taken under the statute. While it is not, strictly speaking, in every respect just such a bond as the statute contemplates, it is in substantial compliance with its requirements, and must be presumed to have been executed with reference to the statute, and must be interpreted by the light thereof. (Heyneman v. Eder, 17 Cal. 433.)

In determining the effect of the words used in the condition of the bond, the intention of the parties ought to override any mere technical objection to the form of the expression; and if the language is uncertain, the surrounding circumstances and the object sought to be accomplished ought to control the interpretation. (Gathwright v. Callaway County, 10 Mo. 663; Hendee v. Taylor, 29 Conn. 448, 454.)

II. Although it may not contain all the conditions of the statute, it is not for that reason absolutely void as a statutory bond. It has been expressly determined in this State that bonds executed under statutes, which omit a part of the conditions specified in the statute, are nevertheless valid as to the conditions they do contain. (Grant & Finney v. Brotherton's Adm'r, 7 Mo. 230; State v. Berry, 12 Mo. 244; Wood *et al.* v. State, 10 Mo. 433.)

III. There is no similarity between this case and those upon which the respondent relies. Here the bond is clearly within the statute, while those referred to by respondent are a class of cases which decide that bonds not executed in conformity to the statute cannot be enforced as statutory bonds; and an examination of those cases will show a wide departure from the statute, as in Waterman & Ryan v. Frank *et al.*, 21 Mo. 108, where the bond was executed by the wrong parties and to the wrong party.

IV. The bond may be erroneous, which is the most that can be said against it; and admitting this to be the true state of the case, the motion to quash the execution was improperly sustained. The universal rule is that the judgment of a court of competent jurisdiction, both as to the subject-matter of the action and the person of the defendant, is conclusive until reversed for error or set aside for irregularity, and cannot be called into question in any collateral proceeding whatever. (McNair *et al.* v. Biddle *et al.*, 8 Mo. 257; Fithian v. Monks *et al.*, 43 Mo. 502; Martin v. Barron, 37 Mo. 31.)

A. S. Harris, for respondents.

The statute (Wagn. Stat. 1024, § 4) does not authorize the bond sued on. It is payable to the sheriff, not the plaintiff. (Waterman v. Frank, 21 Mo. 109–10; Selmes v. Smith, *id.* 527.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff instituted a suit against defendant Quinn for the delivery of personal property, and Quinn, with the other defendants, executed a bond claimed to have been given under section 4 of the act (Wagn. Stat. 1024), and retained the property.

The plaintiff obtained judgment, the damages were assessed, and judgment rendered against the obligors in the bond for the damages so assessed and costs, according to the provisions of section 14. (Wagn. Stat. 1026.) Execution was issued and levied on the real estate of E. A. Holcomb, one of said obligors. Holcomb thereupon filed a motion to quash the execution, which was sustained, and the plaintiff appeals.

The motion was based upon the ground that the bond did not conform to the statute, chiefly in this: that it was conditioned for the delivery of the property to the sheriff instead of to the plaintiff, as required by section 4; hence no summary judgment could be rendered upon it. This is not a statutory bond, and from its want of conformity to the statute, in other things more glaringly even than in the particular named in the motion, was not designed to be such. (Waterman v. Frank, 21 Mo. 109; Selmes v. Smith, *id.* 527.) The plaintiff had furnished his bond, and the one upon which judgment was attempted to be rendered may be a good indemnity to the sheriff for failing to deliver the property to the plaintiff as was his duty, or may furnish a ground of action to the plaintiff, but it does not furnish one upon which the statute authorizes a summary judgment.

Nothing is better settled than that in these summary proceedings against parties not served with process, the statute must be strictly pursued; and they cannot be had against those who have not submitted themselves to the operation of the statute. These bondsmen never agreed to deliver the property to the plaintiff, nor did they authorize a summary judgment to be entered against them, hence it has no more force than though rendered against a stranger without process. A motion to set aside the judgment or quash the execution, or both, is the proper remedy, where a matter is within the control of the trial court; it is better, in

general, to correct or vacate proceedings than to compel a resort to a writ of error. It cannot always be done, but there is no difficulty in an unauthorized judgment like the one under consideration. (Downing v. Stille, 45 Mo. 309.)

The judgment is affirmed. Judge Wagner concurs. Judge Adams absent.

W. W. ORRICK, ADMINISTRATOR OF M. D. VAHEY, DECEASED, Respondent, *v.* BRIDGET VAHEY AND MARK D. VAHEY, Appellants.

1. *Administrator of deceased co-partner — Bondsmen not liable for malversation of partnership effects.*— The sureties on the bond of an administrator of the individual estate of a deceased co-partner are not liable for his malversation of partnership assets. The inventory and appraisement, provided for in sections 53 and 54 of the Administration Act touching partnership estates (Wagn. Stat. 78), are for the purpose of ascertaining the inventory of the deceased member, but they do not authorize the administrator on the personal assets to take charge of the partnership property or exercise any control over the same. Such acts are not within the sphere of his duties, and his bond does not cover them. He may take out letters of administration on the partnership estate, but in that case he must give a new bond, and he acts in a new, separate and distinct capacity.

Appeal from Ray Court of Common Pleas.

Alexander & Chiles and *Wallace & Mitchell*, for appellants.

Even if the partnership estate should be regarded as a distinct and independent estate, and the administrator in charge of both as acting in two entirely different capacities, his sureties on his general administration bond are liable for the distributive share of the deceased partner, and not his sureties on the bond given in respect to the partnership estate. (Wagn. Stat. 73, § 18; *id.* 79, §§ 59, 60; *id.* 109, § 11; Schnell v. Schroeder, 1 Bail. Ch. 334; The People v. White, 11 Ill. 341; Ennis v. Smith, 14 How. 400; Pratt v. Northern, 5 Mason, 95; Morrow v. Peyton, 8 Leigh, 54; Alston v. Munsford, 1 Brock, 266.) Where a sum of money becomes due and payable from a person acting in one fiduciary capacity to the same person acting in another

fiduciary capacity, there is no extinguishment as at common law, but the amount is by operation of law *eo instanti* transferred, and he becomes liable and must account for it in the latter capacity. (State v. Horst, 12 Mo. 365.) When W. W. Orrick made his final settlement of the partnership estate, and the balance due the individual estate was ascertained, and he was ordered by the court to pay the amount to himself as administrator of the individual estate, the character of debtor and creditor became united in the same person, and the amount was instantly transferred by operation of law; and when he subsequently offered his final settlement of the individual estate the court should have charged him with it, since it had not been included in the inventory of the individual estate as the law requires, nor debited to him in his general administration. (The State, to use of Jacobs and Wife, v. Hearse, Adm'r, etc., 12 Mo. 365; Wagn. Stat. 109, §§ 9, 10, 11.)

Geo. W. Dunn, for respondent.

It could not have been intended by the Legislature that the administrator of the individual estate should be charged with one-half of the partnership estate, at the same time that the administrator of the partnership estate must be charged with the whole amount of the partnership estate. The proper construction of the statute (Wagn. Stat. 78, §§ 54, 54) is, that the administrator of the partnership estate must be charged in the first instance with the whole amount of the partnership estate, and the administrator of the individual estate with the amount that comes into his hands as the share of the deceased in the partnership estate, upon the final settlement of the partnership estate. The principles that govern this case are the same that would govern it if one person had been administrator of the individual estate, and another person administrator of the partnership estate. In that case the absurdity of charging one administrator and his sureties with the amount of the defalcation of another administrator, for which other sureties are liable, would be manifest.

WAGNER, Judge, delivered the opinion of the court.

The question here relates to the liability of sureties on an administrator's bond. It seems that Orrick was appointed administrator on the estate of Mark D. Vahey, deceased, and that he duly qualified and gave bond. Vahey had been in partnership with one Jennings, and the latter neglecting to administer on the partnership effects as provided for by statute, Orrick also took out letters of administration on the partnership estate, and gave the additional bond required. The latter bond was only for $1,000, and was grossly inadequate in amount, and the Probate Court was palpably remiss in its duty in not exacting a larger one. Upon a final settlement of the partnership effects, it was found that there was due to the partnership estate $2,472 96, which Orrick had used and converted to his private purposes, and that he was insolvent. His sureties on the partnership bond paid on his account $1,000, the penalty of the bond, and there was then left a balance of $1,472.96 due the individual estate, which he was ordered to pay over. He had used the money before the settlement, and he never held it as individual administrator. Upon a final settlement of the private estate of Vahey, an attempt was made to charge him with the deficit due and owing to the partnership estate. If he was so chargeable, then his sureties on the individual estate would be liable. This constitutes the only question in the case.

To show that the administrator of the private estate is liable for the partnership effects, the statute is cited (Wagn. Stat. 78, §§ 53–4), which provides that the administrator on the estate of the deceased member of the co-partnership shall include in the inventory, which he is required by law to return to the court, the gross amount of the partnership estate as inventoried and appraised, but that he shall be charged with an amount equal only to the deceased's proportional part of the co-partnership interest. And if the surviving partner shall not have administered on the partnership estate at the time the administrator of the estate of the deceased partner shall proceed to take his inventory, it is then the duty of the administrator to include in the

inventory returned to the court the whole of the partnership estate; but the appraisers shall carry out in the footing an amount equal only to the deceased's proportional part of the co-partnership interest. Provision is then made for delivering the property so appraised over to the surviving partner if he elects to administer and gives the necessary bond, but if he neglects or declines to administer, then the individual administrator shall administer on the partnership property; but before proceeding to do so, however, he must give a further bond conditioned to faithfully execute the trust. (Wagn. Stat. 78, §§ 55, 59, 60.)

It is obvious that the inventory and appraisement, provided for in sections 53 and 54, are for the purpose of ascertaining the interest of the deceased member, but they do not authorize the administrator on the personal assets to take charge of the partnership property or exercise any control over the same. (Bredow v. The Mut. Sav. Inst., 28 Mo. 185.) In all instances the surviving partner has the choice to administer on the partnership effects if he sees proper to do so; but if he neglects, then the individual administrator may take out letters of administration on the partnership estate. But he is required to give a new bond, and he acts in a new, separate and distinct capacity. The sureties on the latter bond are responsible for the disposition of the partnership assets, and the sureties on the first bond are held for any malversation as to the individual estate.

Had there been two administrators in this case, one on the separate estate and another on the partnership, it will not be pretended that the individual administrator would be liable for the malfeasance or defalcation of the partnership administrator. Because Orrick acted in a dual or two-fold character, the case is not altered so far as the sureties are concerned. One set of bondsmen agreed that they would be responsible for his faithful performance of duty in the administration of one estate, and the other set held themselves liable for his acts and delinquencies in the other. The liability of the surety is never extended beyond the plain terms of his contract. His undertaking is extended to whatever is comprehended within the scope and limits of his engagements, and he is bound by the conditions of his obliga-

tion, and nothing more. (Blair v. Perpetual Ins. Co., 10 Mo. 559; Nolley v. Callaway County Court, 11 Mo. 447; State, to use of Watts, v. Boon, 44 Mo. 254.)

As the money came into Orrick's hands as partnership assets, and was converted by him while acting as administrator on the partnership property, the sureties on the bond for the partnership administration are alone liable. That loss occurs by reason of the inadequacy of the bond, is the fault of the court exercising probate jurisdiction; but the sureties on the first bond, who never became responsible for the administration of the partnership effects, cannot be made to suffer thereby.

Judgment affirmed. Judge Bliss concurs. Judge Adams absent.

THE STATE OF MISSOURI, Plaintiff in Error, *v.* JAMES R. COOVER, Defendant in Error.

1. *Indictment — Plea of guilty — Jurisdiction.* — Where a person charged with an indictable offense voluntarily submits himself to the jurisdiction of the court by pleading guilty, the judgment is good and will not be reversed. (State v. Warnke, 48 Mo. 451.)

Error to Nodaway Circuit Court.

A. J. Baker, Attorney-General, for plaintiff in error.

Johnson & Royal, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The defendant was indicted for gambling, and pleaded guilty. He seeks to reverse the judgment because no indictment would lie at the time for the offense. (State v. Huffschmidt, 47 Mo. 73.) But the court has since held that where a party voluntarily submits himself to the jurisdiction by pleading guilty, the judgment is good and will not be reversed. (State v. Warnke, 48 Mo. 457.) The court below set aside the judgment on motion, and its action is reversed and the original judgment affirmed. Judge Wagner concurs. Judge Adams absent.

CONRAD HARTZELL, Plaintiff in Error, *v.* JOHN SAUNDERS AND RICHARD SAUNDERS, Defendants in Error.

1. *Bailments — Innkeeper — Contract — Consideration — Lien.*— A., who was an innkeeper, held the baggage of B. to satisfy a board-bill. C., also an innkeeper, agreed with A. to board B. for a certain time in consideration of the promise of A. to retain the baggage as security for the latter's bill. The baggage was released without the payment of the bill. In suit for the amount thereof by C. against A., *held*, that although no benefit might be derived by A. from the agreement, yet the injury received by C. from failure to perform it was a sufficient consideration to support the promise of A.; that the transaction might be considered as in the nature of a voluntary bailment, and of an agreement to enable B. to obtain credit; that in either case the consideration was sufficient; that A. was liable to C. for releasing the baggage.

Error to Buchanan Court of Common Pleas.

T. A. & A. Green, for plaintiff in error.

The trust and confidence shown in this case were a sufficient consideration. If a man makes a gratuitous promise, and enters upon the performance of it, he is held to a full execution of all he has undertaken. (1 Pars. Cont. 372–3, § 8.)

Vories & Vories, for defendants in error.

There was no consideration to support the promise of defendants, even if any such were made. The language of the law is universal as to consideration, that "if loss or disadvantage accrues to him to whom the promise is made, and accrues at the request or on the motion of the promisor, although without benefit to the promisor, the consideration is sufficient to sustain assumpsit." But in this case it was at the request of plaintiff that defendants promised, if at all; and plaintiff, as shown by the evidence, took Irwin to board days before the pretended promise was made. It does not appear that the promise induced plaintiff to board him, and the proof shows that plaintiff requested defendants to retain the trunks. Hence there is in this case not a single element required to make up a consideration. This is not a case where there is a gratuitous or voluntary bailment, and defendants entered

upon the discharge of the duty to the damage of plaintiff. Plaintiff never had possession of the trunks; did not deliver them to defendants, but only retained possession just as they had it before.

BLISS, Judge, delivered the opinion of the court.

The plaintiff was an innkeeper in St. Joseph, and charges that defendants, who were also innkeepers, held certain baggage belonging to one Irwin as security for the payment of a hotel-bill due them; that said Irwin applied to plaintiff for board for himself and wife, and promised to give him a lien on said baggage, subject to defendants' lien; that they called upon the defendants, who agreed to hold the baggage until their own and the debt due the plaintiff for board, etc., should be paid; but that, in violation of said agreement, they surrendered said baggage to said Irwin, in consequence of which the plaintiff lost the amount due him for keeping said Irwin and wife at his inn. The answer denies the agreement; the testimony was contradictory; the plaintiff failed to recover judgment, and now charges that the following errors were committed upon the trial:

1. He offered in evidence a letter from said Irwin to him, which was rejected as hearsay. The plaintiff had no right to this letter as against the defendants. Irwin was a witness, acknowledged the debt to plaintiff, and his letter was not offered to contradict his testimony, but to establish the plaintiff's claim. It came clearly within the category of inadmissible hearsay testimoy, and was properly rejected.

2. The plaintiff asked an instruction directing a verdict in his favor if the facts were found as claimed by him, which the court refused to give. Even if the plaintiff's general view was correct, the instruction was vicious, inasmuch as all the necessary facts were not included, and it submitted a question of law to the jury, to-wit: whether the parties held a lien upon the trunks. It does not, however, seem to have been refused upon these grounds, but the court held the alleged promise of defendants to be a *nude pact* and not obligatory. This view of the court clearly appears in the instructions given at the instance of the defendants, and, if correct, the judgment should be affirmed.

The pleading shows that the plaintiff trusted Irwin in consequence of defendants' promise to hold the property to his use, and he testifies that he refused to receive Irwin at his inn until he gave up to him the Saunders house checks for the baggage; that a few days afterward they went together to the Saunders house, exhibited the checks in plaintiff's possession, and inspected the baggage when the alleged promise was made; and that the plaintiff continued to board Irwin and wife on the strength of it, holding on to the checks. This testimony was contradicted in part by defendants and by Irwin, but its truth or falsity does not now concern us, the only question being whether such a promise, if made, was founded upon a sufficient consideration.

The defendants derived no benefit from making the promise, but did not the plaintiff receive an injury from trusting to it? and did not that injury arise from and grow out of the promise? Suppose Irwin had unconditionally sold the baggage to the plaintiff, and that defendants, on being notified of the sale, promised to hold it for him after the lien was satisfied; in that case would they not become depositaries as truly as though the plaintiff had placed the property in their hands? Their present supposed relation to the property is not precisely that of a depositary, but is analogous to it. At the request of the owner and the plaintiff they agreed to hold it until the claim of the latter was satisfied. This was founded on the supposition that the plaintiff held and was to hold a valid claim by virtue of an agreement with Irwin. The transaction partakes of the nature of a voluntary bailment, and of an agreement to enable Irwin to obtain a credit. In either case the consideration is sufficient, and the view of the court was erroneous. When their own bill was paid, if the defendants were unwilling to hold the property longer, they should have notified the plaintiff to take it away; and, without having done so, had no right to forward it to Irwin.

The judgment of the Court of Common Pleas will be reversed and the cause remanded for a new trial. Judge Wagner concurs. Judge Adams absent.

JAMES A. OWEN AND AGNES J. OWEN, HIS WIFE, Respondents, *v.* ERASTUS D. FORD, ABBIE N. FORD, AGNES G. CARGILL AND JOSEPH C. HULL, Appellants.

1. *Injunction will not lie for past injuries.*—For past injuries or trespasses the only remedy is by an action at law for compensation in damages. In such case injunction furnishes no relief. It is resorted to and applied only where an injury to real or personal property is threatened; and to prevent the doing of a legal wrong when an adequate remedy cannot be afforded by an action for damages.

Appeal from Buchanan Court of Common Pleas.

M. L. Harrington, for appellants, cited Reubins v. Joel, 13 N. Y. 488.

Ensworth & Hill, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The plaintiffs filed their petition praying for a perpetual injunction to restrain the defendants from committing waste on certain premises in which they had an interest, and also asking for damages on account of certain timber cut and carried away. The court, upon the hearing of the cause, assessed damages for the plaintiff, and decreed a perpetual injunction.

Two points are relied on for a reversal of the judgment: first, that the defendants were entitled to a jury in the matter of the assessment of damages, which was denied them by the court; and, secondly, that the petition did not state facts sufficient to authorize the granting of an injunction. It is not denied by the counsel for the plaintiffs that the defendants were legally entitled to a jury trial upon the question of damages, but it is contended that they waived that right. As to whether they waived their right and agreed to abide by a trial before the court, the record is involved in doubt.

The court seems to have been of the opinion that, because one branch of the petition was on the equity side of the jurisdiction, that carried with it that part which was purely legal. Accordingly we find this entry in the record: "The court having

previously decided that the writ herein is a suit in chancery, the same is submitted to the court, defendants at the time objecting." This entry shows that the defendants objected to the trial proceeding before the court. At the next term of the court the record contains the following: "This cause having been under advisement by the court since the last term thereof, at which time the evidence herein was fully heard and the cause submitted to the court by agreement, without the intervention of a jury, the court find," etc. But the bill of exceptions made up by the parties and signed by the court states "that upon the trial of the above entitled cause, the court decided that the suit was a suit in equity, and refused to have a jury impaneled to try the same, to which ruling of the court in refusing to impanel a jury in the cause, and holding that this was a suit in equity where no jury was necessary, the defendants at the time excepted." The record shows that in the first place the defendants specifically objected to the ruling of the court in refusing them a jury, and the bill of exceptions confirms the fact that exception was taken thereto at the proper time. I am inclined to think that the statement in the record, that the cause was tried before the court by agreement, is a clerical error, and that no such agreement was ever made. The next question is whether the petition stated any facts or contained any allegation which would justify a court in granting an injunction. The petition charged that injury to the property had already been done, but there was no averment that any future injury was anticipated or threatened. For past injuries or trespasses the only remedy is an action at law for compensation in damages. Injunction furnishes no relief. It is resorted to and applied only where an injury to real or personal property is threatened, and to prevent the doing of a legal wrong where an adequate remedy cannot be afforded by an action for damages. The petition failed to show any cause whatever which would justify or authorize an injunction, and the result is that the judgment must be reversed and the cause remanded. Judge Bliss concurs. Judge Adams absent.

TANDY H. TRICE, Respondent, *v.* HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroads — Damages — Adjoining owner — Fencing — Statute, construction of.* — A railroad company is liable to an adjoining proprietor for damage caused by the failure of the company to fence in his land along its track. The provision of the statute requiring such fencing (Wagn. Stat. 310-11, § 43) is not unconstitutional. The Legislature may have no right to subject one person to expense for the sole benefit of another, but in the case supposed the protection of the property of adjacent proprietors is merely an incidental object of the statute. Its main and leading object is the protection of the public. And the liability of the road for such failure to fence extends not only to cases where the traveling public would be endangered by the act which caused the damage to the adjoining owner — as in case of a collision with his cattle — but to those where, by reason of the failure of the road to fence, cattle strayed from the track on to the land bordering the road, and destroyed the crops. If the obligation to fence may be imposed at all, it is absolute and unqualified, and those who disregard it may not say that this or that special liability is an improper one.

Appeal from Macon Court of Common Pleas.

Carr, and *Hall & Oliver*, for appellant.

I. While it is conceded that the State has the right, by virtue of its authority, to make police regulations, to require the appellant to erect and maintain a fence on each side of its railroad, still, under the pretense of doing this, the State has no constitutional right or authority to pass a law requiring the appellant to erect and maintain fences, where its railroad passes through cultivated fields, to protect the crops growing in such fields. The former would be the exercise of proper and legitimate authority; the latter would be the exercise of arbitrary and unconstitutional power. It would be taking the money, to which appellant has a vested right, out of its treasury, and applying such money to the erection and maintenance of a fence for the private use and benefit of the proprietor or owner of the adjoining land. The former is done for the protection and safety of the passengers carried and of the property shipped over the appellant's railroad, and not for the protection and safety of the crops growing on the adjoining land. The Legislature has authority

only to pass laws for the protection and safety of passengers carried and property shipped over the appellant's railroad. The respondent was neither a passenger nor a shipper; hence he has no right to complain of the failure of appellant to erect and maintain a fence along the side of his fields.

II. Even if the court shall be of opinion that it was the legal duty of appellant to erect and maintain a fence between the fields in controversy and its railroad, still it was the duty of the respondent to have erected and maintained half of the division fence between them. There is no allegation that respondent performed this duty. (11 Wend. 47; Wagn. Stat., ch. 57; 4 Paige, 553.) Moreover, the respondent was authorized, by the very section of the statute upon which he bases his suit, to have erected said fence, and to sue the appellant for the cost thereof if it neglected or refused to erect such fence in three months after the completion of its railroad. The pleadings show that the railroad had been completed long prior to the alleged injury. The common law imposed upon him the obligation to protect himself if he could do so by a reasonable effort. There is no allegation that he either availed himself of the right conferred on him by the statute, or that he endeavored to protect himself from damage by reasonable effort. (Wagn. Stat., ch. 37, art. II, § 43; 18 Mo. 362; 44 Mo. 302, 436.) The respondent, then, was guilty of such contributory negligence as to bar him from recovering. (4 N. Y. 349; 14 Barb. 364; 1 Allan, 493; 2 Cush. 536.)

Dysart & Brown, for respondent.

Acts like the one under consideration are not unconstitutional, and not inconsistent with appellant's charter. (See Gorman v. Pacific R.R. Co., 26 Mo. 441; Clark's Adm'r v. Hann & St. Jo. R.R. Co., 36 Mo. 219; Wagn. Stat. 312, § 48.)

BLISS, Judge, delivered the opinion of the court.

The pleadings show that defendant's railroad passes through the cultivated fields of the plaintiff; that defendant failed to fence its road, and, in consequence, cattle strayed from the road upon said cultivated fields and destroyed the plaintiff's crops.

The cause was submitted to a jury, who returned a verdict for the damages suffered, and the court rendered judgment double their amount. A motion in arrest was filed and overruled, and the defendant claims that the court committed error in not sustaining the motion. It is not disputed that the case comes within the letter of the statute, but counsel claim that the Legislature have no power to compel the defendant to fence the plaintiff's crops; that to subject it to expense for the private benefit merely of an adjoining proprietor would contravene various provisions of the constitution.

We will not entertain a proposition to set aside or disregard a legislative enactment unless in a clear case, and we do not find such a case made by defendant's counsel. It may be conceded that the Legislature has no right to subject one person to expense for the sole benefit of another, and there is plausibility in the claim that the requirement and liability under consideration, so far as they operated to protect the crops growing upon the land through which the railroad runs, is for the sole benefit of the owner of such crops. With the same plausibility it might be claimed that the liability to the owner of stock killed by cars or engines—a liability created by the same section of the statute—is for the exclusive benefit of the owners of such stock. But such is not the theory upon which this statute has been uniformly sustained. While the protection of the property of adjacent proprietors is an incidental object of the statute, its main and leading one is the protection of the traveling public. To insure such protection railroads are imperatively required to fence their track, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion. A fine might be imposed or a liability might be created for stock killed or for crops destroyed, either for their value or for more than their value, if the destruction should be caused by a non-compliance with the requirement.

Counsel also claim that because of the leading object of the statute, no liability can be created unless the injury suffered arose under circumstances, as by a collision, where the traveling public would be endangered. The claim is more specious than sound.

The nature of the penalty has nothing to do with the power to impose the obligation. If it may be lawfully imposed, those who disregard it may not say that this or that special liability is an improper one, for the power to create the obligation carries with it the power to create liabilities other than those that might arise at common law; and even if we considered such liabilities to be inexpedient or illogical, we could not say that the Legislature had transcended its power.

Judge Wagner concurring, the judgment will be affirmed. Judge Adams absent.

JAMES FUGATE, MARTHA J. HUGHES, *et al.*, Defendants in Error, *v.* HUDSON PIERCE, Plaintiff in Error.

1. *Witnesses — Testimony of wife when a substantial party to suit — Construction of statute.* — It was not the intent of the statute concerning witnesses (Wagn. Stat. 1373, § 5) to exclude the testimony of a wife when she was a substantial party to the suit.
2. *Limitations — Adverse possession, what necessary to constitute.* — A title under the statute of limitations is as good as any other; but, in order to create such title, the possession must be open and notorious, and continuing under claim of ownership. It must be such as to notify the real owner, at least as against him, of the possession and claim; and where continued for the statutory period, the title vests, and if the claimant dies in possession before the title becomes perfect, a continued like possession by his heirs will perfect it.
3. *Limitations — Statute of 1847 — Claims under — There must be ten years' possession subsequent to 1847.* — One entering upon land prior to the limitation act of 1847, and relying upon that act, must show not only ten years' possession, but possession for ten years subsequent to the passage of the act.
4. *Limitations — Adverse possession — Possession of part, with claim to the whole.* — One who takes actual, adverse possession under color of title, is held to be possessed of the contiguous land covered by the instrument under which he claims; but such possession is never based upon a claim merely. There must be a deed purporting to convey the whole, or some proceeding or instrument giving color and defining boundaries, as well as actual possession of a part. And this doctrine is not contrary to a proper interpretation of section 5, article I, of the limitation act of 1847. (See R. C. 1845, p. 1046.)
5. *Ejectment — Inconsistent defenses.* — In ejectment, defendant cannot deny the title of the grantor of plaintiff, and yet claim as purchaser under his grantor. Such defenses are inconsistent, and, when entering upon his proof, defendant may be compelled to elect between them.

6. *Lands and land titles — Tenancy in common—Adverse possession—Ouster.* —The possession of land held by one tenant in common is construed as the possession of all, unless by his denial of their right, or by holding adversely, his co-tenants are ousted.
7. *Possession, adverse — What sufficient against a stranger.* — Mere possession, although for less than ten years, and although the entry were tortious, is sufficient against a stranger.
8. *Lands and land titles — Abandonment.* — The mere leaving of premises, after destruction of the improvements thereon, *animo revertendi*, is not an abandonment. But otherwise if they are wholly given up with no intention of reclaiming them.

Error to Caldwell Circuit Court.

J. D. S. Cook, for plaintiff in error.

I. Thomas J. Hughes was an incompetent witness. (1 Phil. Ev. 76, 82; 1 Cow. & Hill's Notes, note 151; 1 Greenl. Ev., §§ 334–5, 341, and cases cited.) The statute provides for and removes the objection which would arise from his being a party, but says nothing to relieve his disability as her husband. (Gen. Stat. 1865, p. 586, § 1; *id.* 587, § 5.)

II. The title of James Fugate and that of his heirs was limited to the property to which he had color of title, and actually occupied by him, to-wit: the "mill-site" and nothing else. His possession was under a deed to the "mill-site," and his actual occupation was on the "mill-site" only. (See 34 Mo. 194; De Graw v. Taylor, 37 Mo. 310; Johnson v. Prewitt, 32 Mo. 553, 557; Ang. Lim. 416–21, ch. 31, § 15; *id.* 423–5, §§ 16, 17; *id.* 428, § 21; Barr v. Gratz, 4 Wheat. 213.)

III. When a prior possession has been abandoned, as in this case, it cannot be afterward used to found an action of ejectment. (Smith v. Lorillard, 10 Johns. 338; 16 Johns. 314; Ang. Lim. 399.)

Johnson, Dixon & Hoskinson, for defendants in error.

Thomas J. Hughes was a competent witness. Sections 5 and 8, and the provisions in section 1 of the statute concerning witnesses, specify who are incompetent. All others are competent. The wife is only admitted in exceptional cases, but the husband is nowhere classed among those incompetent. So far as he is

concerned, the law attaches no such consequence to the marital relation. (Thomas *et al.* v. Babb *et al.*, 45 Mo. 384.)

Their possession of part, with their claim of owning and possessing all, and their exercise of the ordinary act of ownership over all, was good against all but the holder of the legal title. The defendant invades their possession, and then says they ought to recover only the parts of which they held actual possession. The presumptions which he invokes to maintain his possession are only indulged in favor of the real owner, and are not available in favor of a trespasser and intruder.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs are heirs of James Fugate, deceased, and sought to recover possession of two eighty-acre tracts of land near Far West, in Caldwell county, of which they claim their ancestor died seized. They showed no title in him, but relied upon his possession under color and claim of title. The defendants denied possession except of a small portion, and claim that that was abandoned, and that the interest of one of the plaintiffs had been sold under execution. The plaintiffs recovered judgment, and defendant charges the following errors:

1. The court refused a continuance asked to enable him to obtain the testimony of one Lillard, the sheriff who sold and conveyed the interest of one of the plaintiffs to his grantor. The application fails to show due diligence. The summons was served in May, 1868, and the trial was had in February, 1870. At the August term, 1869, the cause was continued on the application of defendant, and no effort had been made to obtain the testimony of Lillard, who resided within the State until shortly before the term at which the case was tried. The motion shows that notice was then given and sent to the witness, with directions to go before an officer and give his deposition, but defendant never received his testimony. Why this delay? It will never do, after continuances already had, and especially where there are only two terms a year, to encourage a delay of preparation until the close of vacation, with the expectation of a new continuance. It does not appear why Lillard's deposition was not for-

warded. Perhaps no fees were sent; perhaps the witness declined to volunteer his testimony, or perhaps he had none to give. No legal and proper effort was made to obtain it, and the court did right in overruling the motion.

2. Thomas J. Hughes and wife are among the plaintiffs, and claim an interest in the property through Mrs. Hughes, a daughter of James Fugate, deceased. Hughes was sworn as a witness and his testimony was objected to.

Although at common law the husband and wife cannot be witnesses for or against each other, yet the husband should not be excluded in this case for two reasons: First, James C. Fugate has an interest, and has a right to the testimony of Hughes. Hughes himself has an interest, and is seeking possession jointly with Fugate. Though his claim is in right of his wife, it is really his own claim. Second, the statute makes him a witness. The common law excluded the testimony of husband and wife for each other on the ground of interest. The other ground—that of public policy—applies when one is called to testify against the other. Phillips says: "They cannot be witnesses for each other, because their interests are absolutely the same; they cannot be witnesses against each other, because this is inconsistent with the relation of marriage." (1 Phil. Ev. 78.) Gilbert (Gilb. Ev. 252), Taylor (p. 878) and Blackstone (p. 1443) give the same reasons for the exclusion. They were not permitted to testify in support of the claims of each other, because parties and all others interested were excluded and could not be called upon against each other, because it might endanger the peace, unity and mutual confidence so necessary in the marriage relation. This last consideration is analogous to that which forbids the disclosure of confidential professional communications. But the reason for excluding them in the first case no longer exists, for the statute now provides that no person shall be disqualified as a witness in a suit "by reason of his interest in the event of the same as a party or otherwise." (Gen. Stat. 1865, ch. 144, § 1; Wagn. Stat. 1372.) It would seem from this language that the husband and wife might in all cases testify for each other whether parties or not, and such has been the holding of the Supreme Court of

Connecticut, where the statute is almost identical with ours. In Merriman v. H. & N. H. R.R Co., 20 Conn. 354, the wife, though not a party, was admitted as a witness in favor of the husband; the court, by Stoves, J., holding that the statute removed the disability; and in Lucas v. The State, 23 Conn. 18, it is held that the husband and wife may be witnesses for each other. The Supreme Court of New York holds that the husband and wife are competent witnesses in their own behalf when co-plaintiffs or co-defendants (Marsh v. Patton, 30 Barb. 506; Hooper v. Hooper, 43 Barb. 292), though I do not find that the Court of Appeals has passed upon the question, and the language of the New York statute differs somewhat from that of Missouri. The general question has not come directly before this court, though cases have arisen where the common-law doctrine has been greatly modified.

In Tingley *et al.* v. Cowgill, 48 Mo. 291, the wife, with the husband, was a party to the proceeding to set aside the will of her ancestor. In that case she was held to be a competent witness, but chiefly because she, and not the husband, was the real party in interest. The reasoning of the judge delivering the opinion may not quite meet the case at bar, where the husband seeks the possession, and the wife seeks the recognition of her title; but the facts are very similar, and the case can hardly be distinguished in principle. I think a fair construction of the statute should admit the testimony of necessary parties to the record in their own favor and that of other parties, notwithstanding their interest, as parties or otherwise, as in case of husband and wife.

It may be said that inasmuch as section 5 of the Witness Act expressly permits a married woman to testify in certain cases when her husband is a party, whether joined or not, by fair inference it should be held to recognize her exclusion in other cases. (Hardy v. Matthews, 42 Mo. 406.) There is force in this view, yet, as we have seen, it is held not to have this effect when she is the chief party in interest; and by its terms the section can have no force against the husband, only as recognizing the fact that the common law upon the subject is not wholly superseded. In view of this recognition we may not, perhaps, go as far as the

Connecticut courts have gone, yet it would be contrary to the spirit of the statute to exclude a substantial party, because the wife or husband is also a party and has rights to be protected.

3. Exceptions were taken to the instructions given, and to the refusal to give others, upon the question of possession and its effect. A saw-mill was located upon the land, and the plaintiff's ancestor, James Fugate, held from one Havens some kind of a deed, now lost, for about twenty acres, embracing the mill-site. It cannot be now shown whether this last deed was a perfect instrument so as to convey title if held by Havens, but it is not denied that it was sufficient to give color. It is in evidence that decedent claimed the whole of the two eighty-acre lots sued for, and that the quarter-section lines dividing them ran through the improvements, which were all on the mill-site property; that he claimed to hold the remainder by some tax sale, though whether he had a tax deed does not appear; that he offered to sell the whole, and actually sold it once, but took the land back because he could not make a satisfactory title except to the twenty acres; that he made no inclosures outside of the twenty acres, but exercised acts of ownership over the land, such as cutting wood for his house and logs for his mill. The purchase from Havens was in 1843 or 1844, and Fugate died in 1852. His administrator, by direction of the Probate Court, rented out the property for several years, when the mill was swept away by a flood.

Fugate's family seems to have become scattered; the two eldest sons went to California, and have not been heard from since, and when the actual occupation of the premises ceased does not clearly appear; but in 1865 one Lupton, now defending, purchased the pretended interest of one James to an undivided portion of the premises, and put in the defendant as his tenant.

Upon these facts the court gave elaborate instructions on behalf of the plaintiffs, in regard to their title under the statute of limitations, and refused some twenty others asked for on behalf of defendant; but I will not notice them in detail, for the law upon the subjects embraced can be much more briefly given.

A title under the statute of limitations is as good as any other (Nelson v. Brodhack, 44 Mo. 596), but in order to create such

title the possession must be open, notorious, continuing, and under claim of ownership. It must be such as to notify the real owner, at least as against him, of the possession and claim; and when continued for the statutory period the title vests; and if the claimant dies in possession before the title becomes perfect, a continued like possession by his heirs will perfect it. And if the land shall be rented out by the administrator under the statute, the possession will not be held to have been thus interrupted or abandoned.

The instructions given seem not inconsistent with this view, but they were erroneous in naming ten years from the entry by Fugate as the period of limitation, when he took possession in 1843 or '44, before the limitation act of 1847. At the time he entered, twenty years' possession was necessary; and after the act of 1847, if the limitation of ten years is relied upon, it must be ten years after the passage of the act. (Callaway County v. Nolley, 31 Mo. 393; Billion v. Walsh, 46 Mo. 492.)

The plaintiffs claim that, even if there was no actual possession of the whole of the two eighty-acre lots, their ancestor held constructive possession by virtue of his actual occupation of a part, claiming to own the whole; and the court so in effect instructed the jury. This idea of constructive possession is confined to American courts, and was adopted in reference to the fact that in new countries the inclosures and improvements usually embrace only a portion of what actually belongs to the several farms. Hence, when one purchases a farm, although the title may ultimately prove defective, yet if he enter upon it in good faith and make improvements, or occupy those already made, his possession shall be construed to extend to the whole farm covered by his deed. The doctrine of constructive possession, which follows the title when there is no adverse possession, is applied to one who takes actual or corporal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters, and which he claims by virtue of such instrument. But such possession is never based upon a claim merely, and it has never been so held; there must be a deed purporting to convey the whole, or some proceeding or

instrument giving color and defining boundaries, as well as actual possession of a part.

This elementary principle was ignored by the court, probably from a misconstruction of a provision in the act of 1847, being the same as section 5, article I, of limitation act of 1855. That section provides that "the possession of a part of a tract or lot of land in the name of the whole tract claimed, and exercising during the time of such possession the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole tract." Out of abundant caution, the revisors of 1865 inserted the words "under color of title" after the word "possession" in the first line, but it had never been considered that the possession referred to was a naked or tortious possession, or that the provision was other than a declaration of the existing law. In De Graw v. Taylor, 37 Mo. 310, the possession relied on was after the passage of the act of 1847, and the court held that without color of title the person taking possession could hold only the land actually occupied. So great a departure from just principle as to permit one who seizes land *mala fide*, with no color of title, not only to acquire by possession the land actually occupied, but also such of the surrounding lands which he may call his own, will not be presumed without the clearest legislative declaration.

4. Defendant complains that the jury was instructed to disregard the evidence of a sheriff's sale of the interest of James C. Fugate. It is enough to say that there was no evidence that the sheriff's deed was a lawful one, nor is the judgment and execution described with any clearness. Both parties labor under difficulties arising from the burning of the court-house and all the records of the county, and much liberality should be shown in receiving secondary evidence, but such secondary evidence must establish all essential facts. Evidence, however, of the acts and declarations of plaintiff Fugate in regard to this sale was offered, and though it was not sufficient to show title by such sale, yet it should be considered by the jury in inquiring whether there was a voluntary abandonment by him, if prior possession alone was relied upon.

As the case must be re-tried, it should be remarked that the defenses are inconsistent. Defendant first denies all right in the plaintiffs; insists that their ancestor never had any interest in the premises; and, second, asserts his own right as a purchaser of the interest of one of the plaintiffs derived from such ancestor. He cannot do both. He must content himself with contesting the plaintiff's title; or, if he relies himself upon it, must admit it, and show that in whole or in part it has become vested in him. In the latter case, as he only claims to have purchased the interest of one of the four heirs, he can hold only one-fourth of the estate and should disclaim as to the rest, otherwise he will be held to have disseized the plaintiffs of the other three-fourths; for the rule is that the possession by one tenant in common is the possession of all, unless by denying their right, or holding adversely, his co-tenants are ousted. (Hoffstetter v. Blattner, 8 Mo. 276; 1 Washb. Real Prop., 3d ed., 556–7.) If, however, he chooses to rely upon his present possession and resists the whole claim, he should not be permitted to assert his right to the one-fourth interest. The answer being usually but a denial of the plaintiff's right, does not indicate the character of the defense, but the rule against inconsistent defenses should be applied to the admission of evidence. It should be further remarked that it was not incumbent upon the plaintiffs to show such title by possession as would prevail against the true owner. Mere possession, although less than ten years, and although the entry were tortious, is sufficient against a stranger (Sparhawk v. Bullard, 1 Metc. 95); for the law presumes, until the contrary appears, that those in possession are rightfully so. Nor is the same strictness of proof required against a stranger as against one who, but for the adverse claim, would be the owner; for in the latter case the proceeding, or document, or possession, amounts to a transfer of title, and the owner has a right to insist on all the requirements of the law. But a stranger has no right to be protected, and, though not estopped, has less interest in scrutinizing the claims of others.

In the case at bar, the mere possession of the ancestor will not avail the plaintiffs if it appears that they have voluntarily aban-

doned the premises. Merely leaving them after the improvements were destroyed, *animo revertendi*, is not an abandonment; but if they were wholly given up with no intention of reclaiming them, then they are not wronged by the defendant's entry.

The judgment will be reversed and the cause remanded for a new trial. Judge Wagner concurs. Judge Adams absent.

[END OF FEBRUARY TERM.]